

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

4 December 2023

CASE No: AIFC-C/CFI/2023/0046

LLP “TEMIR ZAT”

LLP “BauProject”

LLP “MCI Group”

Claimants

v

Joint Venture “Alaygyr” LLP

Defendant /Respondent

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JUDGMENT AND ORDER

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Justice of the Court:

The Rt. Hon. The Lord Faulks KC

**JUDGMENT AND ORDER**

1. Pursuant to a Claim Form made on 30 November 2023 the Claimant seeks an Order from this Court to recognise and enforce the measures set forth in paragraph 12 of the IAC Interim Relief Award dated 23 October 2023 made by the panel of arbitrators (the presiding arbitrator – Dr. Jaroslaw Turlukowski appointed by a letter dated 8 June 2023, arbitrator on behalf of the Claimant – Mr. Arman Shaikenov appointed by the letter dated 9 February 2023, and arbitrator on behalf of the Respondent – Mr. Dmitriy Bratus appointed by the letter dated 9 February 2023) appointed by Mr. Thomas Krümmel, the Chairman of the International Arbitration Centre of Kazakhstan, in the IAC Case No. 29 of 2022.
2. Having read the Award it appears to me that the application is justified. Accordingly, I hereby order:
  1. To grant the Respondent's request for interim relief dated 15 August 2023 in part.
  2. Prohibit the Claimant from alienating the Claimant's movable and immovable property.
  3. To prohibit the Claimant from disposing of the funds on the Claimant's bank accounts in the amount of the Respondent's claimed counterclaims 15,572,318,798.61 tenge (Fifteen billion five hundred seventy-two million three hundred eighteen thousand seven hundred ninety-eight tenge sixty-one tiyn).
  4. To consider that the prohibitions established by this Award do not apply to:
    - fulfillment by the Claimant of its obligations to third parties, which arose for the Claimant before the present Award;
    - fulfillment by the Claimant of its obligations to its employees under labour contracts concluded before the date of this Award and in the amount of wages, for which it was established before the date of this Award.
  5. Prohibit the Claimant from undertaking obligations towards third parties after the date of this Award and obligations related to the alienation of movable and immovable property without written permission from the Arbitral Tribunal.
  6. Reject the issuance of an order for the Claimant to provide the Respondent with a bank guarantee in the amount of 116,908,442 tenge (One hundred sixteen million nine hundred eight thousand four hundred forty-two tenge) for the Respondent's representatives and other expenses related to the arbitration proceedings.
3. The Claimants are given liberty to apply to have this Order set aside within 7 days of service upon it of this Order.

By the Court,

Justice, The Rt. Hon. The Lord Faulks KC

**Representation:**

The Claimants were not represented.

The Defendant was represented by Mr. Adilkhan Bazarbayev, Ms. Zhanel Khabieva.



IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

14 November 2023

CASE No: AIFC-C/CFI/2023/0039

AOM SDF I B.V. BESLOTEN VENNOOTSCHAP

Claimant

v

AQUA FACTORIA LLP

Defendant

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JUDGMENT AND ORDER

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Justice of the Court:  
The Rt. Hon. The Lord Faulks KC





## **JUDGMENT AND ORDER**

1. Pursuant to a Claim Form made on 8 November 2023 the Claimant seeks an Order from this Court to recognise and enforce the measures set forth in paragraph 143 of the IAC Arbitration Award dated 18 October 2023 made by Mr. Alexander Korobeinikov, the sole arbitrator appointed by a letter dated 8 June 2023 of Mr. Thomas Krümmel, the Chairman of the International Arbitration Centre of Kazakhstan, in IAC Arbitration Case No 5/2023.
2. Having read the Award it appears to me that the application is justified. Accordingly, I hereby order:  
That Aqua Factoria LLP to pay to AOM SDF I B. V. Besloten Vennootschap:
  1. the debt in the amount of 242,784,174.28 (two hundred forty-two million seven hundred eighty-four thousand one hundred seventy-four tenge twenty-eight tiyn).
  2. expenses relating to the payment of the arbitrator's fee in the amount of 500,000 (five hundred thousand) tenge.By no later than 18:00 Astana time on 29 November 2023, being 15 days from the date of this Judgment and Order.
3. The Defendant is given liberty to apply to have this Order set aside within 7 days of service upon it of this Order.

By Order of the Court,

The Rt. Hon. The Lord Faulks KC  
Justice, AIFC Court

### **Representation:**

The Claimant was represented by Mr. Kanat Mukanov, Legal Counsel on Investment Activities.

The Defendant was not represented.



IN THE COURT OF FIRST INSTANCE  
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

1 November 2023

CASE No: AIFC-C/CFI/2023/0037

Zhanbek Suyunov

Claimant

v

"NURLY-KUS" LLP

Defendant

Ms. Sara Omarova

Defendant

Mr. Oleg Tyo

Defendant

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JUDGMENT AND ORDER

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Justice of the Court:  
The Rt. Hon. The Lord Faulks KC



### **JUDGMENT AND ORDER**

1. Pursuant to a Claim Form made on 27 October 2023 the Claimant seeks an Order from this Court to recognise and enforce the measures set forth in paragraph 32 of the IAC Arbitration Award dated 23 August 2023 made by Ms. Snezhanna Kutsenko, the sole arbitrator appointed by a letter dated 21 June 2023 of Mr. Thomas Krümmel, the Chairman of the International Arbitration Centre of Kazakhstan, in IAC Arbitration Case No 9/2023.

2. Having read the Award it appears to me that the application is justified. Accordingly, I hereby order:

That "NURLY-KUS" LLP BIN 080840018639, Sara Omarova IIN 540509401698, Oleg Tyo IIN 740624300264 pay to Zhanbek Suyunov on a joint and several basis:

1. the debt in the amount of 11 189 750 tenge, the amount of one-time penalty in the amount of 550 000 tenge, the penalty amount of 5 035 387 tenge 5 tiyn, the representation expenses in the amount of 678 000 tenge, the arbitrator fee in the amount of 150,000 tenge.

By no later than 6pm Astana time on 16 November 2023, being 15 days from the date of this Judgment and Order.

3. The Defendant is given liberty to apply to have this Order set aside within 7 days of service upon it of this Order.

By the Court,

The Rt. Hon. The Lord Faulks KC  
Justice, AIFC Court

Representation:

The Claimant was represented by Mr. Daniyar Niyazgulov, "Benefits & Partners" Law Firm.

The Defendant was not represented.

IN THE COURT OF FIRST INSTANCE  
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

27 October 2023

CASE No: AIFC-C/CFI/2023/0036

MR. TIMUR YELEUSSIZOV

Claimant

v

"ABN ALLIANCE" LLP,  
MR. NURLAN RYSBEKOV,  
MR. BAZARKUL AIDAROV

Defendants

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JUDGMENT AND ORDER

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Justice of the Court:  
The Rt. Hon. The Lord Faulks KC

### **JUDGMENT AND ORDER**

1. Pursuant to a Claim Form made on 24 October 2022 the Claimant seeks an Order from this Court to recognise and enforce the measures set forth in part IV of the IAC Arbitration Award dated 16 October 2023 made by Ms. Elena Nesterova, the sole arbitrator appointed by a letter dated 5 July 2023 of Mr. Thomas Krümmel, the Chairman of the International Arbitration Centre of Kazakhstan, in IAC Arbitration Case No 10/2023.
2. Having read the Award it appears to me that the application is justified. Accordingly, I hereby order:  
That "ABN Alliance" Limited Liability Partnership, Mr. Nurlan Rysbekov and Mr. Bazarkul Aidarov pay in solidary to Mr. Timur Yeleusizov 19 958 021 (nineteen million nine hundred fifty-eight thousand twenty-one) tenge:
  - 1) the amount of the principal debt, remuneration and penalty in the amount of 18,958,021 (eighteen million nine hundred fifty-eight thousand twenty-one) tenge;
  - 2) arbitration costs in the amount of 1,000,000 (one million) tenge.By no later than 6pm Astana time on Monday 13 November 2023, being 15 days from the date of this Judgment and Order.
3. The Defendant is given liberty to apply to have this Order set aside within 7 days of service upon it of this Order.

By Order of the Court,

The Rt. Hon. The Lord Faulks KC,  
Justice, AIFC Court

#### **Representation:**

The Claimant was represented by himself.

The Defendant was not represented.



IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

21 November 2023

CASE No: AIFC-C/SCC/2023/0034

CROWE AUDIT ASTANA LLP

Claimant

v

GRAIN CONSORTIUM OF KAZAKHSTAN LLP

Defendant

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JUDGMENT

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Justice of the Court:

Justice Patricia Edwards

**ORDER**

UPON the commencement of a Claim on 16 October 2023;

AND UPON the filing of a Defence on 30 October 2023;

AND UPON the filing of a Reply on 9 November 2023;

IT IS ORDERED that:

1. The Defendant shall, by 16:00 Astana time on 8 December 2023, pay the Claimant 2,744,000 KZT.

**JUDGMENT**

1. Under an Agreement dated 6 May 2022, the Claimant agreed to provide audit services for the year 2021, in return for payment by the Defendant of 3,920,000 KZT including VAT.
2. Pursuant to article 4.2, the Defendant paid 50% of the contract sum within five days of signing the contract. The remainder of the contract sum was agreed to be payable within five business days of the Claimant completing its services and the parties signing a certificate of acceptance.
3. Article 4 included the following provisions:

*“4.5. The Customer will obtain a certificate of acceptance of the services rendered by the Auditor together with an invoice for payment of the second instalment of remuneration as specified in clause 4.2 of this article of the Agreement. The Customer shall sign, date and return such a rendered service certificate to the Auditor or send a reasonable refusal to the Auditor of signing the same, within 10 (ten) business days after receipt of a rendered service certificate. In case, at expiration of stated 10 (ten) business days, the Auditor does not obtain from the Customer a signed service acceptance certificate or a reasonable refusal of signing the same, the Parties shall acknowledge that a service acceptance certificate shall be deemed signed and the Services shall be deemed rendered by the Auditor and accepted by the Customer in a scope and subject to conditions as specified in such rendered service acceptance certificate.*

...

*4.8. The audit of the Customer’s financial statements for 2021 is scheduled to begin on May 11, 2022, subject to the Customer’s compliance with the terms of this Agreement, and the Customer undertakes to submit the draft financial statements for 2021 prepared in accordance with IFRS within the following time frame.*

- *by May 11, 2022 – draft financial statements for 2021;*

- by June 20, 2022 – the final financial statements for 2021.

*4.9. The Auditor shall proceed to fulfilment of its obligations under the present Agreement after signing it and receiving an advance payment stated in clause 4.2 of this article of the Agreement is credited to the Auditor's current account, as well as after the Auditor is presented draft financial statements prepared in accordance with the IFRS, under clause 4.8 of this article of the Agreement.*

*4.10. According to the results of the provision of services, the Auditor plans to submit the following documents to the Customer:*

*a) an audit report on the financial statements of the Customer for the year completed on December 31, 2021, prepared in accordance with IFRS, is scheduled to be submitted to the Customer within 10 (ten) working days from the date of receipt of the final (adjusted) financial statements for the 2021 prepared by the Customer in accordance with IFRS, subject to the timely provision by the Customer of the updated financial statements;*

*...*

*4.11. In case the Customer fails to prepare or untimely prepares information provided for in clause 2.1 of article 2 of the present Agreement or preparation or presentation of necessary documentation, financial statements or other information requested by the Auditor ... is delayed through the Customer's fault that results in probable inability of the Auditor to fulfil its obligations within the terms provided for by the present Agreement, the cost and terms of services rendering by the Auditor may significantly change.*

*In that case the Customer undertakes to additionally pay for work actually performed by the Auditor. An amount paid to the Auditor in such a case will be calculated based on hourly rates of the Auditor's personnel and time actually spent by them to render the services under the present Agreement."*

4. On 13 February 2023, the parties concluded Supplementary Agreement No 1. The total contractual sum was increased to 4,704,000 KZT. In addition, the date for provision of the "final financial statements" by the Defendant in article 4.8 was changed from 20 June 2022 to "March 6, 2023".
5. I have not seen any documents evidencing when the final financial statements were sent to the Claimant, although it appears to be common ground that they were eventually sent.
6. On 28 April 2023, the Claimant says that it sent to the Defendant by email electronic versions of the audit report on the financial statements for 2021, together with an invoice and certificate of services rendered, but had no response. I have not seen copies of any of these documents.
7. On 17 August 2023, the Claimant sent to the Defendant by post an audit report and an invoice for payment of the second half of the contract sum. It asked the Defendant to sign and return the



copy of the act of services rendered within ten business days. There was no response from the Defendant.

8. On 5 September 2023, the Claimant sent a letter of claim, asking to the Defendant to pay the remaining half of the contract sum by 11 September 2023.

#### **Jurisdiction**

9. The parties agreed in article 7 of their contract that any dispute would be decided by the courts, and subject to the laws, of the AIFC.
10. Pursuant to Article 13.4 of the Constitutional Statute of the Republic of Kazakhstan on the Astana International Financial Centre, Constitutional Statute No. 438-V ZRK of 7 December 2015 (as amended), the AIFC has exclusive jurisdiction in relation to disputes transferred to the AIFC Court by agreement of the parties. This court therefore has jurisdiction over this claim.
11. The Claimant claims 2,744,000 KZT. This is equivalent to approximately US\$5,944. As this is less than US\$150,000, it is appropriate that the claim be determined in the Small Claims Court pursuant to Rule 28.1(1) of the AIFC Court Rules.

#### **Decision**

12. In its Defence, the Defendant alleges that, in breach of contract, the Claimant did not provide an audit of the financial statements within the agreed period.
13. Insofar as paragraph 5 of the Defence seeks to allege that the Claimant ought to have provided its audit report prior to the parties entering into Supplementary Agreement No 1, no basis for this allegation has been identified, and on the terms of the contract the Claimant could not have done so when the Defendant had not yet provided its final financial statements. Supplementary Agreement No 1 extended the time for the Defendant to do so.
14. In paragraph 7 of the Defence, referring to Supplementary Agreement No 1, the Defendant says that the Claimant breached "*its obligation to provide an audit of the financial statements by March 06, 2023*".
15. However, this misunderstands the agreement. As the Claimant has observed, Supplementary Agreement No 1 extended the deadline for the Defendant to provide the "*final financial statements*" under article 4.8 to 6 March 2023. The Claimant could not produce its audit report

until after it had received and worked on those documents. The importance of timely and accurate provision of documents by the Defendant is apparent from the agreement, in particular articles 2 and 4.

16. I also note that there is no suggestion or evidence that the Defendant ever contacted the Claimant or complained about any delay in providing the Claimant's services.
17. Furthermore, in article 4.5, the parties agreed that the Defendant had ten business days to sign a rendered service certificate or to send a reasonable refusal to sign. If it did neither, the audit services were to be deemed rendered and accepted. The Defendant did not respond to the documents sent by the Claimant on 17 August 2023. Accordingly, it is deemed to have accepted the services.
18. In short, the Claimant has supplied its services, and the Defendant has failed to pay the balance of the sums due under the contract without identifying any lawful excuse.
19. At the end of the Defence, the Defendant asked for time to provide supporting documents. However, not only has the Defendant been aware of this claim for several months, it does not in any event appear to me that any further documents are needed on any of the matters in issue. The Defendant has relied on an incorrect understanding of the contractual terms.
20. As the Defendant has already paid half of the original contract price, the remaining sum due is 2,744,000 KZT.

By the AIFC Small Claims Court,

Patricia Edwards,  
Justice, AIFC Small Claims Court

**Representation:**

The Claimant was represented by Mr. Arman Baimyshev, lawyer, Crowe Outsourcing KZ, Almaty, Kazakhstan.

The Defendant was represented by Mr. Ryskulbekov, Deputy General Director of "Grain Consortium of Kazakhstan, Astana, Kazakhstan.

**IN THE COURT OF FIRST INSTANCE  
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE**

**23 November 2023**

**CASE No: AIFC-C/CFI/2023/0033**

**CLAIMANT**

**Claimant**

**v**

**(1) DEFENDANT A  
(2) DEFENDANT B  
(3) DEFENDANT C  
(4) DEFENDANT D**

**Defendants**

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**JUDGMENT**

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**Justice of the Court:  
Justice Sir Rupert Jackson**

## JUDGMENT

This judgment is in five parts, namely:

Part 1. Introduction

Part 2. The facts

Part 3. The present proceedings

Part 4. The first issue: The timing of the CLAIMANT's challenge to DEFENDANT B's appointment

Part 5. The second issue: The merits of the CLAIMANT's application

### PART 1. INTRODUCTION

- 1.1 This is an Arbitration Claim brought pursuant to Part 27 of the AIFC Court Rules in order to challenge the decision of an arbitral tribunal to dismiss an application that one member of the tribunal be removed for lack of impartiality.
- 1.2 In this Judgment I shall refer to the International Arbitration Centre of the Astana International Financial Centre as "the IAC". I shall refer to the Arbitration Rules of the IAC as "the IAC Rules". I shall refer to the CLAIMANT as "CLAIMANT". I shall refer to DEFENDANT D as "DEFENDANT D". CLAIMANT is the CLAIMANT in the present proceedings before the AIFC Court, but the Respondent in the underlying arbitration. DEFENDANT D is a Respondent in these proceedings before the AIFC Court, but a Claimant in the underlying arbitration.
- 1.3 After these introductory remarks, I must now turn to the facts.

### PART 2. THE FACTS

- 2.1 On 24 November 2022, DEFENDANT D sent CLAIMANT and the IAC a request for arbitration in respect of a contractual dispute which had arisen between DEFENDANT D and CLAIMANT. The contract between the parties contained an arbitration clause requiring any such dispute to be settled by arbitration under the jurisdiction of the IAC.
- 2.2 On 14 February 2023, the Registry of the IAC, after discussing the case with the IAC Chairman, directed the proceedings to be conducted by a single arbitrator. After receiving that direction, Mr. Vataev, Counsel for DEFENDANT D, and Mr. Tukulov, Counsel for CLAIMANT, discussed this matter in a constructive way. They agreed that the interest of their respective clients would be best served by having a panel of three arbitrators. They both notified the IAC Registry of that decision and agreement by emails dated 16 and 21 February 2023.
- 2.3 On 22 February 2023, the IAC Registry very sensibly emailed both Parties accepting that decision and requesting the parties each to nominate one arbitrator promptly. CLAIMANT duly nominated DEFENDANT C. No issue arises about that nomination.
- 2.4 On 1 March 2023, DEFENDANT D nominated DEFENDANT B. On 8 March, Mr. Tukulov sent an email to the IAC Registry objecting to the nomination of DEFENDANT B. In paragraph 3 of his email, Mr. Tukulov wrote:

*“Enmity has existed between Mr. Tukulov and [DEFENDANT B] for several years. We attach email correspondence which proves such enmity. Further email correspondence is provided for more background. We specifically draw your attention to the email of [DEFENDANT B] dated 6 December 2021 to Mr. Tukulov and many well-known practitioners in Kazakhstan within the framework of [the] Arbitration Litigation Committee of the Kazakhstan Bar Association.”*

Mr. Tukulov then set out that email. Mr. Tukulov maintained that DEFENDANT B was in breach of Article 9.2 of the IAC Rules by failing to disclose that matter. Mr. Tukulov copied that email to Mr. Vataev and to the Parties, but not to the two nominated arbitrators.

- 2.5 On 14 March 2023, DEFENDANT B responded to the concerns which Mr. Tukulov had expressed, stating that there was no real enmity between her and Mr. Tukulov.
- 2.6 On 28 April 2023, the Chairman of the IAC, believing that he had jurisdiction to deal with the substantive challenge, sent a letter to Mr. Vataev and Mr. Tukulov stating that CLAIMANT’s challenge to DEFENDANT B was dismissed. He confirmed DEFENDANT B’s appointment. Much correspondence followed between the parties, which is set out in Mr. Tukulov’s helpful chronology, but which I need not set out in this Judgment.
- 2.7 The parties were unable to agree on an appropriate Chairman for the tribunal. This is by no means an unusual situation. I have encountered it from time to time myself in arbitrations. Therefore, the Chairman of the IAC nominated a suitable Chairman in the exercise of his powers under Article 8.4 (3) of the IAC Rules. The Chairman of the IAC selected as the presiding arbitrator and Chairman of the panel, DEFENDANT A.
- 2.8 On 8 June 2023, the Registry wrote to both parties stating that the following arbitrators were appointed to constitute the tribunal in this arbitration: DEFENDANT A as presiding arbitrator, DEFENDANT B appointed by the IAC on behalf of the CLAIMANT, and DEFENDANT C appointed by the IAC on behalf of the Respondent.
- 2.9 Unfortunately, despite the concerns which Mr. Tukulov and his clients had about the suitability of DEFENDANT B, neither CLAIMANT, nor its lawyers, exercised their rights under Article 10.3 of the IAC Rules or Regulation 20.2 of the AIFC Arbitration Regulations to send a written statement to the tribunal challenging the appointment of DEFENDANT B. The time allowed under Article 10.3 of the Rules for doing this was 14 days. The time allowed for making such a challenge under Regulation 22.2 of the Regulations was 15 days. The tribunal was appointed on 8 June 2023, so the 14-day period under the Rules expired on 22 June 2023, and the 15-day period under the Regulations expired on 23 June 2023. Instead of pursuing that particular remedy, CLAIMANT applied to the AIFC Court challenging DEFENDANT B’s appointment and the Decision of the IAC Chairman.
- 2.10 Lord Faulks KC dealt with this matter in a written decision dated 26 June 2023. The actual decision of Lord Faulks KC appears in the second sentence of paragraph 4:

*“... I am not satisfied that there are sufficient grounds to challenge the appointment. Accordingly, I reject the application.”*

I comment that Lord Faulks KC could not actually do otherwise, because the jurisdiction to allow such a challenge is vested in the first instance in the arbitral tribunal. The Court’s role to deal with the challenge only arises if the arbitral tribunal has rejected it, and thereafter there is an application to the Court under Article 10.7 of the Rules or under Article 22.3 of the Regulations. Since there had been no prior tribunal decision and no such application under the Rules and Regulations, Lord Faulks KC could not do other than what he did, namely, to reject the application.

- 2.11 CLAIMANT's lawyers then applied to the Chief Justice of the AIFC Court for permission to appeal against the Decision of Lord Faulks KC. On 14 July 2023, Lord Mance, who was then the Chief Justice of the Court, made an Order, the operative part of which is in paragraph 10. That was an Order staying the request for permission to appeal.
- 2.12 However, understandably the Chief Justice was concerned about the situation which had arisen, and he sought the assistance of the Parties as to the appropriate way forward. Mr. Vataev sent an email on 13 July 2023 which read as follows:

*"Dear Mr. Registrar,*

*I wanted to confirm to you that I, as a counsel for [DEFENDANT D] (the Claimant in IAC Case 30/2022), am aware of the AIFC Court judgment in Case 19 of 2023 on the application of Mr. Tukulov (a counsel for [CLAIMANT], the Respondent in IAC Case 30/2022), whereby the latter tried to challenge the appointment of [DEFENDANT B] as an arbitrator in the said arbitration case. I have downloaded and reviewed the judgment from the AIFC Court website and shared it with my co-counsel and the client.*

*We understand that the proper procedure for challenging an arbitrator under the IAC Arbitration and Mediation Rules (Article 10 of both Rules 2018 and 2022) is an application to the arbitral tribunal, not to the AIFC Court."*

- 2.13 The Chief Justice gained the impression from that email and from other materials from the Registry that the Parties were in agreement that such a challenge to the appointment of DEFENDANT B could still be made to the tribunal. The Chief Justice reflected that understanding in what I would call the obiter part of its decision. He asked to be informed if that understanding was incorrect. No one in fact reverted to the Chief Justice to say whether or not his understanding was correct. It seems to me that there was a bit of a misunderstanding, because Mr. Vataev did not intend to convey to the Registry or to the Chief Justice that any application to challenge would be in time. His email was merely stating what the correct procedure was.
- 2.14 By 14 July 2023, the date of the Chief Justice's Decision, the arbitration was well advanced. There had been a case management conference on 5 July 2023, and the tribunal had issued its first Procedural Order on 6 July 2023. There was also correspondence dealing with administrative aspects of the arbitration and the tribunal's appointment, as well as their fees. Mr. Tukulov very responsibly played an active part in that correspondence. But Mr. Tukulov had not abandoned his desire to challenge the appointment of DEFENDANT B.
- 2.15 On 18 July 2023, Mr. Tukulov wrote to the tribunal challenging the appointment of DEFENDANT B on the grounds that she was not impartial.
- 2.16 On 10 August 2023, the tribunal issued a unanimous Decision dismissing that challenge. The grounds for that Decision were that CLAIMANT had made the challenge too late. The Rules, as I have previously mentioned, provide a time limit of 14 days for making such a challenge. The Regulations provide a time limit of 15 days for making such a challenge. The challenge in this case was made well after the expiration of both those time limits. Thus, the tribunal, as I say, dismissed the challenge of DEFENDANT B's appointment.
- 2.17 CLAIMANT and Mr. Tukulov were aggrieved by the tribunal's Decision. Accordingly, they commenced the present proceedings.

### PART 3. THE PRESENT PROCEEDINGS

3.1 I am told and I have no reason to doubt (although it is not apparent from the agreed bundle) that the proceedings were commenced on 17 August 2023. In a Claim Form issued in the AIFC Court on 16 October 2023, CLAIMANT set out its full case. CLAIMANT applied to the Court to set aside the tribunal's Decision dated 10 August 2023 and to remove DEFENDANT B's appointment as an arbitrator. These proceedings were brought against four Parties: the first defendant is DEFENDANT A, as the Chairman of the tribunal and presiding arbitrator; the second Defendant is DEFENDANT B; the third Defendant is DEFENDANT C; and the fourth Defendant is DEFENDANT D.

3.2 DEFENDANT A and DEFENDANT C responded to the Claim Form by adopting an entirely neutral position. DEFENDANT B responded by email dated 10 November 2023. She said that she would not participate actively in the proceedings. However, she offered some comments in paragraphs 5 and 6 of her email for the assistance of the court. Since there has been some discussion about these paragraphs, I will read them out.

*"5. I also take comfort in my appointment in a detailed and reasoned opinion of the IAC Chairman, Mr. Krümmel, dated 28 April 2023, who was making this Decision on Appointment as an Arbitrator, and the entire package of documents and was aware of all the facts of the case.*

*6. Unlike the other grounds to challenge an Arbitrator, "enmity" to a party representative is a very subjective ground, as enmity is a feeling, and only an Arbitrator herself can reliably state whether she has a feeling of enmity. I declare that I do not feel any enmity to Mr. Tukulov. There was a disagreement on my part with his position on the scope of the ethical rules for lawyers in the context of a professional discussion of the concept of "duty to the Court", which took place long ago. I genuinely believe that I am capable of making an independent and impartial decision as an Arbitrator."*

3.3 In its written Defence to the Claim, dated 13 November 2023, DEFENDANT D argued that CLAIMANT had impliedly consented to DEFENDANT B's appointment by its conduct. Secondly, DEFENDANT D said that CLAIMANT's challenge to the appointment of DEFENDANT B was out of time. Thirdly, DEFENDANT D said that the matters relied upon by CLAIMANT do not establish any lack of impartiality on the part of DEFENDANT B.

3.4 The hearing date for these proceedings was fixed for today, Wednesday, 22 November 2023. We had a slightly late start owing to yesterday's case overrunning. That is not a problem. At the hearing today, Mr. Tukulov appears as counsel for CLAIMANT and Mr. Vataev appears as counsel for DEFENDANT D. I thank both counsel for their helpful written submissions, lodged in advance of the hearing, which I have carefully considered. I also thank them and for their helpful oral submissions today.

3.5 I will now address the issues in a logical order dealing first with the timing of the CLAIMANT's challenge to DEFENDANT B's appointment.

### PART 4. THE FIRST ISSUE: THE TIMING OF THE CLAIMANT'S CHALLENGE TO DEFENDANT B'S APPOINTMENT

4.1 Article 10.3 of the Rules is clear. It says:

*"A party wishing to challenge an arbitrator shall submit a statement to the tribunal stating the reasons for the challenge within 14 days from the date the circumstances giving rise to the challenge became known to the party. The party wishing to challenge must at the same time send a copy of its written statement to all other parties. Failure to challenge an arbitrator within 14*

*days of becoming aware of the relevant circumstances constitutes a waiver of the party's right to make the challenge."*

4.2 One of the issues which arises in this case is what happens if a party becomes aware of grounds to challenge a member of the tribunal before the tribunal is appointed. Since the challenge must be made to the tribunal as a whole under Article 10.3 of the Rules, time cannot start to run until the tribunal as a whole has been appointed. That is because until then there is no tribunal to apply to. This interpretation of Article 10.3 of the Rules is consistent with Regulation 22(2) of the AIFC Arbitration Regulations.

4.3 Nevertheless, it is obviously good practice to give prompt notice to all parties of the challenge which will be coming when the full tribunal has been constituted. Mr. Tukulov did that on 8 March 2023, although it would have been better if he had included DEFENDANT B and DEFENDANT C in his email of that date.

4.4 Regulation 22.2 of the AIFC Regulations says:

*"In the absence of such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in Article 21(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge."*

4.5 Mr. Tukulov argued this morning that because of the word "or" in Regulation 22(2), it would be possible to launch a valid challenge to the appointment of the particular tribunal member within 15 days after becoming aware of the grounds for the challenge, even if the full tribunal has not been appointed. I do not accept that submission. It seems to me that the challenge, whether made under Regulation 22 of the Regulations or under Article 10 of the Rules, is a challenge which must be made to the tribunal when constituted. The word "or", which we see in Regulation 22(2), is designed to deal with the situation when a party becomes aware of a ground for challenge after the tribunal has been constituted. Suppose that on 1 July 2023 the tribunal is constituted, and on 1 August 2023 one party discovers a ground for challenging a tribunal member. That party clearly cannot do so within 14 or 15 days of the tribunal being appointed. But he can do so within 14 or 15 days of learning the grounds for challenge. So, the function of that limb of Regulation 22 is to tell us that if you become aware of grounds for the challenge after the appointment of the tribunal, you still have a couple of weeks in which to make your challenge. Regulation 22(2) of the Regulations does not say that an effective and timeous challenge can be made before the tribunal has been appointed. The very simple reason for that is that there is no one to whom the challenge can be made.

4.6 It therefore follows, contrary I am afraid to Mr. Tukulov's submissions, that the email which he sent to the Registry, copied to the parties, on 8 March 2022, was not an effective challenge under Regulation 22.2 of the Regulations or under Article 10.3 of the Rules.

4.7 I agree that the time limit can be extended in appropriate cases as a matter of discretion. But in the present case, there was no application for an extension of time. Furthermore, the present challenge was not made until 18 July 2023. It is highly unlikely that at that late date any application for an extension of time would have been granted. Mr. Tukulov made a forceful submission that justice should prevail over formality. Where it is possible for justice to prevail over formalities without prejudice to either party, I have great sympathy with that submission.

4.8 If an application is made to the tribunal to challenge a tribunal member, long after the time limits for making such an application have expired, either without an application for extension of time or after



the rejection of such an application, I do not see how the tribunal can do other than dismiss it. If thereafter there is an application to the Court under Article 10.7 of the Rules, or under Regulation 22(3) of the Regulations, the Court cannot do anything about what has gone wrong. The Court cannot conjure up a jurisdiction of the tribunal and then proceed to allow the challenge.

- 4.9 In the present case, the application to the tribunal was made long out of time. There was no application for extension of time, so the Court could not do other than dismiss it.
- 4.10 Therefore, I am bound to uphold the tribunal's decision and to dismiss this appeal. But before parting with this case, I must say something about the second issue which concerns the merits of the CLAIMANT's application.

#### PART 5. THE SECOND ISSUE: THE MERITS OF THE CLAIMANT'S APPLICATION

- 5.1 I entirely reject Mr. Vataev's suggestion that the CLAIMANT's application to remove DEFENDANT B is a delaying tactic or an attempt to disrupt the arbitration. I have no hesitation in accepting that Mr. Tukulov has a genuine concern that there may be prejudice against his client because of past disagreements between himself and DEFENDANT B. However, having read the bundle and DEFENDANT B's various declaration, emails, and statements, I accept what she says. She does not feel enmity towards Mr. Tukulov.
- 5.2 I am satisfied that past disagreements will not cloud her approach to this arbitration. Any experienced lawyer is well used to putting irrelevant matters out of their mind and focusing on the evidence and the issues that are relevant. There is no suggestion in the document that DEFENDANT B has ever had any enmity towards CLAIMANT. The parties to this arbitration are not the advocates, they are CLAIMANT and DEFENDANT D. The fact that DEFENDANT B may in the past have had disagreements with Mr. Tukulov cannot cause her to be in any way hostile to Mr. Tukulov's client.
- 5.3 Mr. Tukulov mentioned in his submissions this morning that he may have to withdraw from this case if DEFENDANT B remains on the panel. I emphatically reject that suggestion. It would be a great loss to CLAIMANT if Mr. Tukulov and his firm withdraw from this arbitration. I have had the experience of Mr. Tukulov's advocacy on more than one occasion. I have read his submissions and I can see how skillfully he conducts litigation and arbitration. It would be a great loss for CLAIMANT to forgo his services. So, I urge him to give no further consideration to withdrawing. And, insofar as I have any business to do so, I hope that CLAIMANT will not consider dismissing Mr. Tukulov because of his past disagreements with one member of the tribunal.
- 5.4 Mr. Tukulov, towards the end of his submissions this morning, drew my attention to four matters. First, he said, when she was nominated, DEFENDANT B did not disclose her past disagreements with Mr. Tukulov. It is clear to me that DEFENDANT B did not regard those past disagreements as being a matter which could possibly affect her impartiality, and that is why she did not disclose the matter. Maybe, it would have been wiser to disclose. Speaking for myself, as a matter of precaution, I always disclose anything that could be remotely relevant. But there is no reason to go to extremes. I do not accept that her appointment can be challenged because she did not make that disclosure.
- 5.5 The second point which Mr. Tukulov made is that DEFENDANT B participated in the tribunal decision to reject the challenge to her appointment. She really had no choice. The tribunal Chairman had suggested that the other two members of the tribunal should consider the challenge, and then once they had made a decision, the tribunal as a whole should issue it. Mr. Tukulov very sensibly agreed to that. Mr. Vataev felt that may be procedurally improper because of the provisions of Rule 10.1 of the IAC Rules. Having received that response from Mr. Vataev, the tribunal was not going to proceed in a way whereby either party considered the tribunal was acting unlawfully. So they proceeded to reach an unanimous decision. But if DEFENDANT B had taken no part in the decision, I have no doubt it

would have been the same. This was not a decision from which any member of the tribunal dissented. The tribunal reached what is, in my view, an entirely proper decision.

- 5.6 The third point, which Mr. Tukulov raises, is the email of the 6 December 2021 sent by DEFENDANT B to a number of lawyers. I can see that feelings were running high then. But there are from time to time disagreements between members of the profession. As Mr. Vataev said, this is an adversarial profession. I hope that as time passes and senior practitioners in Kazakhstan conduct more and more arbitrations under the IAC Rules, perhaps some of these personal disagreements will reduce in their intensity. But I do not see any problem arising from the December 2021 email.
- 5.7 Mr. Tukulov's fourth point concerns the terms of the defence which DEFENDANT B sent to the Claim in these proceedings. I have read out the two paragraphs to which Mr. Tukulov draws attention. In the first part of her email, DEFENDANT B made it quite clear that she was going to take no part in this litigation. She left the decision to the tribunal, but she added some comments for the assistance of the Court. I do not see that as being any ground to disqualify her from serving as arbitrator.
- 5.8 Now, none of the matters which Mr. Tukulov has urged this morning suggest to me that DEFENDANT B would not be impartial as between DEFENDANT D and CLAIMANT. Mr. Tukulov relies upon paragraph 2(c) of Part 1 of the IBA Guidelines on Conflict of Interest in International Arbitration. Paragraph 2(c) reads as follows:

*"... doubts are justifiable if a reasonable third person having knowledge of the relevant facts and circumstances would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision."*

- 5.9 The reasonable third-party test is one that crops up in a number of contexts, particularly when one is dealing with allegations of bias against a judge or a tribunal. It is not the most helpful legal test that I have ever encountered. Quite a lot of authority has accumulated in the United Kingdom about what the reasonable third person is like, how much knowledge he or she should have about the way things are done, how fair and reasonable he or she is, and so forth. I must confess to the somewhat heretical view that it is not a terribly helpful test, but that is the test which I must apply. I have not got to say what I think the answer is but what I think a reasonable person would say the answer is. Doing my best, I think that a reasonable third person would not think that there is a likelihood that DEFENDANT B would be other than impartial in her conduct of this arbitration.
- 5.10 I hope that when this judgment has been transcribed, a copy of it will be passed to all members of the tribunal so that they can see that this Court, which has a supervisory role over the conduct of the arbitration, has every confidence that all three members of the tribunal will conduct these proceedings properly.
- 5.11 For the reasons which I have stated, this arbitration claim is dismissed.

#### **ORDER ON COSTS**

1. Upon consideration of the statement of costs that was submitted by DEFENDANT D on 21 November 2023, I direct that KZT 5,000,000 (five million tenge) be paid by the CLAIMANT to DEFENDANT D within 28 days.



By Order of the Court,

Sir Rupert Jackson,  
Justice, AIFC Court

**Representation:**

The CLAIMANT was represented by Mr. Bakhyt Tukulov, Tukulov & Kassilgov Litigation LLP, Almaty, Republic of Kazakhstan.

DEFENDANTS 1-3 were not represented.

DEFENDANT 4 was represented by Mr. Sergey Vataev, Advocate, Legit Law Firm, Almaty, Republic of Kazakhstan.

IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

5 December 2023

CASE No: AIFC-C/SCC/2023/0032

Mr Sayan Abdikhairanov

Claimant

v

Astana International Exchange Ltd

Defendant

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JUDGMENT

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Justice of the Court:

Justice Charles Banner KC



## ORDER

1. The hearing is adjourned until Tuesday 16 January 2024.
2. Each party has liberty to apply to the Court to extend this date.

## JUDGMENT

1. The Claimant in these proceedings is Mr Sayan Abdikhairanov. The Defendant is his former employer, Astana International Exchange Ltd (“AIX”) for whom he worked from 23 April 2019 until 30 March 2022.
2. In the Claim Form and at the hearing on 1 December 2023, Mr Abdikhairanov gave a clear and convincing account of the factual background. In the light of this, the Court makes the following factual findings, which Ms Guldana Mirasheva for AIX confirmed that AIX does not contest:
  - 1) In 2014 Mr Abdikhairanov was awarded a prestigious Bolashak scholarship by the Republic of Kazakhstan, which provided for him with funding to study at the University of Reading in the United Kingdom, where he graduated with a LLM in International Banking Law.
  - 2) The terms of the scholarship were, and still are, governed by a Tripartite Agreement made between Mr Abdikhairanov, his employer at the time (the General Prosecutor’s Office of the Republic of Kazakhstan).
  - 3) Under the Tripartite Agreement, Mr Abdikhairanov was required upon graduation to return to the Republic of Kazakhstan within 15 days, which he did on 27 February 2017, and thereafter work for his employer or in other organisations located in Kazakhstan for a period of at least 5 years.
  - 4) On 17 March 2017 Mr Abdikhairanov was appointed as Head of the Division for the Supervision of Environmental Legislation at the General Prosecutor’s Office, in which role he worked for 137 days. On 4 August 2017 he changed jobs to work at Tsesnabank JSC as a lawyer, where he worked for 620 days. On 23 April 2019 he moved to AIX, where he worked as a Senior Associate in the Issuer Regulation Department.
  - 5) During the COVID-19 pandemic, Mr Abdikhairanov performed this role remotely. Following the lifting of COVID-related restrictions, he moved to the USA on 21 April 2021 and, with AIX’s agreement, continued to work remotely in the same role as before until 23 April 2022.
3. The Centre for International Programs JSC (“**the CIP**”), which administers the Bolashak scholarship programme, has expressed the view that Mr Abdikhairanov’s remote work from the USA does not qualify as relevant work for an organisation located in Kazakhstan.
4. In the light of this, Mr Abdikhairanov invites the Court to order AIX to file a report to the CIP confirming that he has worked for AIX in full accordance with his terms of employment from



23 April 2019 until 30 March 2022, thus completing 5 years of post-graduation employment for organisations based in Kazakhstan.

5. Ms Mirasheva submits that the Court has no power to order AIX to do so, because it was not a party to the Tripartite Agreement. Mr Abdikhairanov disputes this.
6. That dispute is a matter that the Court may need to resolve. However, it may not need to do so, because Ms Mirasheva also told the Court at the hearing on 1 December 2023 that AIX has considerable sympathy with Mr Abdikhairanov's predicament and is content to send CIP a report in the terms outlined paragraph 4 above. If it does so, then (possibly depending on CIP's response), it may not longer be necessary for the Court to determine this claim.
7. The Court concludes that it is in the interests of justice and in accordance with the overriding objective in Rule 1.6 of the AIFC Court Rules for this short judgment to be issued, making the factual findings in paragraph 2 above, and for the hearing to be adjourned until 16 January 2024, to provide 4 working weeks (allowing for the Christmas and New Year period) for AIX to submit the report and for CIP to consider it. If more time is needed, either party may apply to the Court for an extension of this date.
8. If, having been provided with this judgment and AIX's report, CIP change their stance, then the parties may be in a position to discontinue the proceedings. Otherwise, following the end of the period of adjournment, the Court will make directions for the future progress of the case. If AIX does not submit the report as it told the Court it would, this may have costs consequences.

By Order of the Court,

Charles Banner KC

Justice, AIFC Small Claims Court

Representation:

The Claimant was represented by himself.

The Defendant was represented by Ms. Guldana Mirasheva, Head Legal at Astana International Exchange Ltd, Astana, Kazakhstan.

IN THE SMALL CLAIMS COURT  
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

7 November 2023

CASE No: AIFC-C/SCC/2023/0031

JSC “QAZAQ AIR”

Claimant

v

INDIVIDUAL ENTREPRENEUR ORUZHAYEV TALGAT KABDRUSELEVICH

Defendant

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JUDGMENT

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Justice of the Court:

Justice Charles Banner KC

**ORDER**

1. **The Claim is allowed.**
2. **The Claimant's application for costs is granted.**
3. **The Defendant shall pay the Claimant the total sum of 1,306,447.50 Tenge within 7 days of this judgment.**

**JUDGMENT**

**Introduction**

1. By this claim, the Claimant seeks sums which it says the Defendant is liable to pay to it pursuant to a Service Purchase Agreement ("**the Agreement**") dated 25<sup>th</sup> April 2023.
2. The Agreement was for the provision by the Defendant to the Claimant of electronic document management services, for a price of 2,400,000 Tenge.
3. The Claimant says that the Defendant failed to perform its obligations under the Agreement, and that as a result the Claimant terminated the Agreement on 18<sup>th</sup> May 2023. It submits that as a result of these matters, it is entitled to a penalty of 1,200,000 Tenge pursuant to Clause 7.2.4 of the Agreement.
4. Clause 12.4 of the Agreement gives the AIFC Court exclusive jurisdiction over disputes arising out of or in connection with the Agreement.
5. The value of the claim is below USD 150,000 and therefore the claim falls within the jurisdiction of the AIFC Small Claims Court: see Rule 28.2(1) of the AIFC Court Rules.
6. Rule 28.12 of the AIFC Court Rules provides:

"Within 14 days after he is served with a Small Claim Form, a defendant shall:

(1) Admit the claim by filing and serving on the claimant an admission in accordance with Part 10;

(2) File a Small Claim Defence to the claim setting out:

(a) which parts of the claim are admitted;



(b) which parts are denied and his reasons for denying those parts; and

(c) the details of any counterclaim; or

(3) Make an application to dispute the jurisdiction of the SCC in accordance with Part 6 and in every case shall provide an email address for service and state his residential address. Where the defendant is not an individual, he shall state the address at which he carries on business.”

7. The Defendant has not taken any of the steps to which Rule 28.12 refers, or otherwise has not sought to resist the claim.

#### **The Court’s findings**

8. Upon considering the papers, the Court is satisfied that the Claim is well founded. The Court allows the claim and awards the Claimant the 1,200,000 Tenge that it seeks pursuant to the Agreement.

#### **Costs**

9. The Claimant also seeks an award of costs of 106,447.50 Tenge in relation to the costs of the translation and notarization of the documents it relies upon in these proceedings.

10. Under Rule 26.9(2) of the AIFC Court Rules, costs may only be awarded against a party in the AIFC Small Claims Court where that party has acted unreasonably.

11. The Claimant has described its repeated efforts since May 2023 to resolve this matter out of court by correspondence with the Defendant sent both by email and by hand, as well as by telephone and in person. No response or even acknowledgment was forthcoming by the Defendant at any stage. The Claimant was therefore left with no option but to commence these proceedings, which the Defendant then did not defend or even respond to.

12. In *Kostanai Minerals (Kazakhstan) v Factory Dnepropetrovskaya Volna OJSC (Ukraine)*, this Court observed at para. 18:

“...the kind of persistent failure and delay in complying with legal and procedural obligations demonstrated by the Defendant in this case, in particular the unexplained failure to comply with

the terms of the Mediation Agreement coupled with the equally unexplained failure to comply with Rule 28.12, may well in a future case lead to a finding of unreasonable behaviour so as to justify an award of costs under Rule 26.9(2).”

13. Having regard to the above, the Court finds that in the circumstances of the present case the Defendant has acted unreasonably, in persistently failing to engage with the Claimant’s repeated attempts to resolve this matter out of court, thereby forcing the Claimant to commence these proceedings, and thereafter failing without explanation to comply with Rule 28.12.

14. The Court therefore awards the Claimant the costs sought of 106,447.50 Tenge.

### **Conclusion**

15. The Court orders the Defendant to pay the Claimant the total sum of 1,306,447.50 Tenge within 7 days of this judgment. Given the already extensive delays in paying the Claimant the sums due to it, there is no justification for a longer deadline.

By Order of the Court,

Charles Banner KC  
Justice, AIFC Small Claims Court

### **Representation:**

The Claimant was represented by Ms. Dina Askarova, lawyer, JSC “Qazaq Air”, Astana, Kazakhstan.

The Defendant was not represented.

**IN THE COURT OF FIRST INSTANCE  
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE**

**14 November 2023**

**CASE No: AIFC-C/CFI/2023/0030**

**METEOR MINING COMPANY KZ LTD (CONDUIT 22)**

**Claimant/Appellant**

**v**

**PRIVATE COMPANY AURORA GEOPHYSICS LIMITED**

**Defendant/Respondent**

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**JUDGMENT**

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**Justice of the Court:**

**The Rt. Hon. The Lord Faulks KC**

**ORDER**

The application for permission to appeal is refused.

**JUDGMENT**

1. The Defendant acknowledged that the debts under the various contracts were owing.
2. In its Defence, the Defendant said that it lacked the funds to pay the debt and also maintained that it had not received "proper signed reports" and wanted delivery up of "any outstanding deliverables".
3. These contentions were unsupported by evidence.
4. I refuse permission to appeal.
5. An appeal has no prospects of success. The judge was entirely right to conclude that all the sums said to be owing were in fact due to be paid, and that the full 10% penalty had accrued, as the debts had been overdue for more than 100 days.

By Order of the Court,

The Rt. Hon. The Lord Faulks KC  
Justice, AIFC Court

**Representation:**

The Claimant was represented by Mr. Dauren Gabdull, Meteor Mining Company KZ Ltd (CONDUIT 22), Astana, Kazakhstan.

The Defendant was represented by Mr. Nariman Omarov, legal counsel, Aurora Geophysics Ltd., Astana, Kazakhstan.

IN THE COURT OF FIRST INSTANCE  
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

31 October 2023

CASE No: AIFC-C/CFI/2023/0028

Aidana Aituarova

Appellant/Claimant

v

Private Company Smart Parking Technologies Ltd

Respondent/Defendant

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JUDGMENT

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Justice of the Court:

The Rt. Hon. Sir Stephen Richards

## **ORDER**

**The required extension of time is granted but the application for permission to appeal is refused.**

## **JUDGMENT**

1. This is an application for permission to appeal against a decision of the AIFC Small Claims Court (“the SCC”) in Case No. AIFC-C/SCC/2023/0009. In the proceedings before the SCC the Claimant sought various remedies in relation to what she contended was her unlawful dismissal by the Defendant. The SCC allowed her claim to the limited extent of ordering the Defendant to pay damages to her in compensation for the truncation of her statutory notice period under Regulation 60 of the AIFC Employment Regulations, but in all other respects the claim was dismissed. By this application the Claimant seeks to challenge various aspects of the SCC’s decision.
2. In addition to the Claimant’s application notice and supporting documents, the Court has received written submissions on behalf of the Defendant in accordance with Rule 29.13 of the AIFC Court Rules. The Claimant has requested an oral hearing but the Court is satisfied that the application can be fairly determined on paper without an oral hearing (see Rules 29.16-29.17).
3. The application requires an extension of time. An attempt was made to file it within the time limit laid down by Rule 29.10 but guidance was needed from the Court’s Registry, and additional time was taken, to get the application in order. The Claimant states that the delay was due to unfamiliarity with the AIFC Court’s jurisdiction. Such an argument carries limited weight now that the Court has been in operation for several years. In the particular circumstances, however, the Court considers it appropriate to grant an extension of time.
4. Rule 29.6 states that permission to appeal may be given where the appeal Court considers that (1) the appeal would have a real prospect of success or (2) there is some other compelling reason why the appeal should be heard. By Rule 29.7 success on an appeal depends on establishing that the decision of the lower Court was (1) wrong or (2) unjust because of a serious procedural or other irregularity in the proceedings in the lower Court.
5. In the proceedings below the Claimant challenged the Defendant’s reason for her dismissal. The SCC held that under Regulation 60 of the AIFC Employment Regulations the Defendant was entitled to terminate her employment without cause, subject to giving her the 30 days’ notice provided for by Regulation 60(2)(b): the Defendant therefore did not need to have any particular reason to dismiss her, and whether the stated reason was the actual reason for dismissal was immaterial to the Claimant’s claim for damages. The Claimant argues in her application notice that the Court had to investigate the reason for her dismissal because on the facts the termination was not a termination without cause. That argument cannot be accepted. The SCC was entitled to conclude that the reason for dismissal could not in the circumstances affect the claim for damages.

6. The Claimant complains next about the SCC's calculation of the damages for a shortfall of three days in the notice period provided for by Regulation 60(2)(b). The calculation was based upon the Claimant's annual salary under her employment contract. She contends that there was no legal ground for the Court to calculate it in that way and that the only relevant example in the AIFC Employment Regulations is Regulation 28, which provides that compensation in lieu of vacation leave is to be calculated using the employee's daily wage for the last day of employment. That, however, relates to a specific and different situation and does not provide the basis for a general rule displacing the approach of the SCC in this case. The Claimant has not established any arguable legal error in the SCC's approach and has not shown that the sum actually awarded as compensation was arguably wrong.
7. The SCC stated that the Claimant had abandoned her claim for reinstatement, referring specifically to her confirmation of that through counsel at the hearing. The Claimant contends that she did not abandon her claim for reinstatement and that "the Judge asked only will the Claimant continue to work for the Defendant after if the Court will order the reinstatement", to which the answer was that it was very hard to believe that after everything that happened between the parties they would have very good employment relations. The Court clearly understood, however, that her counsel had confirmed that the Claimant no longer pursued her claim for reinstatement. The written submissions on behalf of the Defendant also state that at the court hearing the Claimant through her counsel disavowed her former claim for reinstatement. Despite the Claimant's contention to the contrary, there is no sound basis for holding that the SCC's understanding of the position was wrong.
8. A further claim before the SCC was that when the Claimant moved to the Defendant, the Defendant's Mr Omarov promised by way of verbal agreement to transfer to her 3% of the shares in the Defendant company, Private Company Smart Parking Technologies Ltd. The Court found that the Claimant had not discharged the burden of proof on the issue. It stated that Mr Omarov gave clear and credible evidence, both in writing and orally at the hearing, to the effect that no such promise was made; that the Court did not have the benefit of evidence directly from the Claimant herself, either in writing or at the hearing, for which no explanation was provided; nor was there any convincing explanation for why she did not make a contemporaneous written record of the claimed promise. In her application notice the Claimant contends that "the promise was regarding another company – Parquor Ltd" and that the Court did not investigate this. That contention is unsustainable: the Claimant's claim form in the SCC alleged in terms (paragraphs 43 and 46) that the agreement related to shares in Private Company Smart Parking Technologies Ltd; and that was the allegation responded to by Mr Omarov in his written evidence and, as understood by the Court, in his oral evidence. There was simply no basis for pursuing an alleged promise relating to Parquor Ltd.
9. The Claimant also submits that it was inappropriate for the Court to place weight on the fact that she did not herself give first hand evidence: she had given all her evidence in the claim form and the Court should have informed her if it considered there to be a need for her to give first hand evidence. The Court was plainly entitled, however, to take into account the absence of direct evidence from the Claimant without informing her of a need to give such evidence. The Claimant was legally represented. The claim form set out her case, included a statement of truth signed by her lawyer and was accompanied by supporting documentation, but it was for the Claimant to decide what further evidence to produce in support of her case – just as the Defendant decided to adduce the written and oral evidence of Mr Omarov in support of the defence case.

10. The final complaint in the application notice concerns the SCC's rejection of the Claimant's claim that there was a verbal agreement between the parties that she would be paid a *per diem* allowance in respect of a business trip to San Francisco. Here, too, the Court took into account the fact that the Claimant did not give evidence whereas the Defendant through Mr Omarov gave clear and credible evidence that there was no such agreement and that in fact the Claimant's expenses on the trip were charged to the company credit card and her overnight accommodation was an apartment rented by Mr Omarov. The Claimant states that this was just assertion by Mr Omarov, without supporting evidence. The assessment of the evidence was, however, a matter for the Court, and the Court's conclusion on the issue is not open to successful challenge.
11. In conclusion, the conditions for the grant of permission to appeal (paragraph 4 above) are not met and the Claimant's application must be refused.

By the Court,

The Rt. Hon. Sir Stephen Richards

Justice, AIFC Court

Representation:

The Claimant/Appellant was represented by Mr Aibek Kabyshev, Associate at Akhmetova Law Firm Limited, Astana, Kazakhstan.

The Defendant/Respondent was represented by Mr Abilkhair Mergaliyev, Associate at Tukulov & Kassilgov Litigation, Astana, Kazakhstan





IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

17 November 2023

CASE No: AIFC-C/SCC/2023/0027

PRIVATE COMPANY AURORA GEOPHYSICS LTD

Claimant

v

METEOR MINING COMPANY KZ (CONDUIT 24) LTD

Defendant

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JUDGMENT

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Justice of the Court:

Justice Tom Montagu-Smith KC

## ORDER

1. **The Defendant shall pay the Claimant the sum of KZT 24,948,000 by 16:00 Astana time on 1 December 2023.**

## JUDGMENT

1. In this claim, the Claimant seeks to recover sums due under two contracts for the provision of geophysical services (“the Contracts”), numbered 260AG-2021 and 123AG-2021. Under the terms of the Contracts, the Claimant agreed to carry out geophysical surveys at two sites in the Almaty Region of Kazakhstan and in Eastern Kazakhstan. The contracts were dated 17 November 2021 and 25 December 2021 respectively.
2. Under the terms of the Contracts, the Defendant was obliged to pay a total of KZT 22,680,000 for the services as follows:
  - a. Under Contract 260AG-2021, KZT 10,200,000;
  - b. Under Contract 123AG-2021, KZT 12,480,000.
3. By clause 3.1.1 of the Contracts, the Defendant was obliged to pay 40% of the sums due within 5 business days of signing the Contract.
4. Clause 3.1.2 provided:

*“Subsequent payments are made monthly upon completion of field and processing works, no later than 5 (five) business days from the date of signing by the parties of the Certificate of Completion.”*
5. By clause 6.3 of the Contracts, late payment resulted in a penalty being imposed on the Defendant of 0.1% of the total amount of the Contract for each day of delay, up to a maximum of 10%.
6. The Contracts contained a jurisdiction agreement in favour of the Specialized Interdistrict Economic Court of Astana.
7. The parties signed a certificate of completed works for the Contracts on 14 April 2022 and 1 June 2022. The sum certified in each case was the full Contract sum referred to at paragraph 2 above. Despite this, the Defendant paid nothing for the works.
8. On 15 June 2022, the parties signed a reconciliation act – a mutually agreed statement of account – confirming the sums due.
9. On 16 June 2022, the Claimant sent the Defendant a notice setting out its claim. The notice stated the sums due under the Contracts and that the Defendant had accepted the works. It demanded payment within 5 business days. The notice was signed by both parties. It appears that the Defendant’s signatory added the words *“Acknowledged with pending deliverables (i.e. final geophysical reports)”*.
10. No payment was made in response to the notice. As a result, the Claimant brought a claim in the Specialized Interdistrict Economic Court. The Court however rejected the claim on grounds of jurisdiction, finding that the AIFC Court should hear the case as both parties are AIFC Establishments.

11. The Claimant therefore subsequently brought this claim in the AIFC Courts.
12. The Defendant filed a Defence. In it, the Defendant asserts as follows:
  - a. The only useful part of the Claimant's work for the Defendant was the ultimate production of a survey report.
  - b. The Contracts required payment of 40% shortly after signature. However, the Claimant knew the Defendant had no means to pay until the reports were delivered and an investor could be found. As a result, the Claimant went ahead with the works without payment.
  - c. The Contracts were concluded during the crisis caused by the outbreak of Covid-19. In effect, the Defendant says that it was content for the Claimant to fit in work under the Contracts around other clients who were able to make payments up front.
  - d. The Defendant did pay the Claimant c. KZT200m for other services.
  - e. The balancing payment of 60% was not due until after delivery of the reports.
  - f. The Defendant signed the act certificates of completed works because it wanted to give the Claimant confidence that the Defendant would pay and wanted to work together with the Claimant in the future.
  - g. The Defendant signed the reconciliation act but noted that the key deliverables – the reports – had not been produced.
  - h. The reports are now complete but have not been handed over. The Claimant should not receive any payment or, at least, should be awarded only 40% of its claim.
13. The Defendant produced no new documents or evidence than had already been submitted by the Claimant.
14. On 28 September 2023, I issued directions:
  - a. Permitting the Claimant to file a Reply; and
  - b. Requiring the parties to file and witness statements and other documents on which they rely by 18:00 Astana time on 25 October 2023.
  - c. Seeking the parties' comments on whether they required a hearing or were content for the matter to be decided on paper.
15. The Claimant filed a Reply, in which it says:
  - a. It provided services during Covid-19 without prior payment because that was a necessity as a result of the crisis.
  - b. The Defendant did not in fact pay KZT 200,000,000. Nor did the Claimant prioritise other work over the Contracts.
  - c. Payment was not due on delivery of the reports, but before.

- d. The Claimant was entitled to withhold production of the reports because the Claimant did not pay.
16. The Claimant's duly filed a witness statement from Mr Kemal Amanbayev.
17. Mr Amanbayev says that while the Claimant did agree to proceed with the works before payment was made, it would never have agreed only to be paid if any when the Defendant received investor funding.
18. The Defendant did not file any witness evidence.
19. Both parties subsequently indicated that they wanted the case to be decided on the papers.
20. As the Defendant appears to accept, 40% of the Contract sums was due within 5 days of signature of the Contracts. The fact that the Claimant proceeded with the works without insisting on prior payment does not alter the terms of the Contract. The Defendant stops short of arguing that the Contracts were amended. On any view, then, that sum is long overdue.
21. The balance 60% was due on completion of *"field and processing works, no later than 5 (five) business days from the date of signing by the parties of the Certificate of Completion"*.
22. The difference between the parties comes down to the proper construction of this provision. According to the Defendant, the *"field and processing works"* referred to include the provision of the report. The obligation to pay the balance under the Contract is therefore not triggered until the report is delivered.
23. The Claimant disagrees and points to clause 4.2.3. This permits the Claimant to *"retain the results of the Works"* in the event of non-payment.
24. In my view, the Defendant was obliged to pay the balancing sum within 5 days of signing the certificate of completion. That is what the Contracts require. The Defendant's position is effectively that it signed the certificate prematurely. That would not, in my view, provide a defence as the timing of the payment was set by the date of the certificate.
25. In any event, in my view, the certificate was not premature. The *"field and processing works"* referred to in clause 3.1.2 did not include the provision of reports. The reports were to come later, after payment. If they came before, clause 4.2.3, which permitted the Claimant to withhold the *"results of the Works"* in the event of non-payment, would be deprived of much of its force. In the circumstances, the full contract sums were due in June 2022.
26. Even if that were wrong, the Claimant would be entitled to terminate the Contracts on the basis of the Defendant's failure to pay the first 40% of the sums due and claim damages. By the Defendant's own admission, the Claimant has done everything it needed to do to complete the works. In those circumstances, its loss is the contract sum.
27. No doubt if the sums due are paid, the reports will be produced. If they are not, the Defendant may then have a legal remedy.
28. The sums have been overdue by more than 100 days. As a result, the full 10% penalty has accrued under clause 6.3 of each Contract.
29. In the circumstances, the Defendant is obliged to pay the Claimant the full sum claimed, being KZT 24,948,000, comprised of:



- a. The principal sums due under the Contracts, amounting to KZT 22,680,000; and
- b. The penalty of 10% of the Contract sums, being KZT 2,268,000.

By Order of the Court,

Justice Tom Montagu-Smith KC,  
Justice, AIFC Small Claims Court

Representation:

The Claimant was represented by Mr. Nariman Omarov, legal counsel, Aurora Geophysics Ltd., Astana, Kazakhstan.

The Defendant was represented by Mr. Dauren Gabdull, Meteor Mining Company KZ (CONDUIT 24) Ltd., Astana, Kazakhstan.



IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

12 September 2023

CASE No: AIFC-C/SCC/2023/0026

CROWE AUDIT ASTANA LLP

Claimant

v

KAP TRADE LTD

Defendant

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ORDER

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Justice of the Court:

Justice Patricia Edwards



## **ORDER**

BY REQUEST:

1. The claim is discontinued.

By Order of the Court,

Patricia Edwards  
Justice, AIFC Court

Representation:

The Claimant was represented by Mr. Arman Baymishev, lawyer, Crowe Outsourcing KZ, Almaty, Kazakhstan.

The Defendant was not represented.



IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

12 September 2023

CASE No: AIFC-C/SCC/2023/0025

CROWE AUDIT ASTANA LLP

Claimant

v

KAZAKH AGRO PRODUCTION (KAP) LTD

Defendant

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ORDER

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Justice of the Court:

Justice Patricia Edwards





## **ORDER**

BY REQUEST:

1. The claim is discontinued.

By Order of the Court,

Patricia Edwards  
Justice, AIFC Court

Representation:

The Claimant was represented by Mr. Arman Baymishev, lawyer, Crowe Outsourcing KZ, Almaty, Kazakhstan.

The Defendant was not represented.



IN THE COURT OF FIRST INSTANCE  
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

22 November 2023

CASE No: AIFC-C/CFI/2023/0023

FREEDOM FINANCE JSC

Claimant

v

MR. EGOR ROMANYUK

Defendant

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JUDGMENT

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Justice of the Court:  
Justice Sir Rupert Jackson



## JUDGMENT

This judgment is in six parts, namely:

Part 1. Introduction

Part 2. The facts

Part 3. The present proceedings

Part 4. The first issue: Did Clause 7 of SRCA remain in force after 1 February 2023?

Part 5. The second issue: Did the Defendant's posts on social media constitute breaches of Clause 7?

Part 6. The third issue: To what remedy is the Claimant entitled?

### PART 1. INTRODUCTION

1.1. This is the second action between Freedom Finance JSC and Mr. Egor Romanyuk concerning alleged breaches of a Separation and Release of Claims Agreement dated 1 February 2020. I shall refer to that as the "SRCA".

1.2. The background facts and the relevant terms of the SRCA are set out in the Judgment which I gave on 1 February 2023 in the first action between the parties, Case No. 20 of 2022. I shall not repeat anything which I said in that judgment. I shall assume that anyone listening to or reading this judgment is familiar with the previous judgment and with the abbreviations used in that judgment.

1.3. After these introductory remarks, I must now turn to the facts.

### PART 2. THE FACTS

2.1. Following the handing down of the Court's judgment in the first action, the Defendant continued to make adverse comments about the Claimant on social media. At a Directions hearing on 4 September 2023, I refused the Claimant's application for the hearing of this case in private. However, I directed that in order not to give wider currency to those adverse comments, they should not be read out in Court. Instead, they should be referred to by reference to paragraph numbers in the Amended Claim Form.

2.2. The relevant comments are set out in paragraphs 13 to 19 of the Amended Claim Form. The Defendant admits that he made the posts which are alleged in June and July 2023. We can see that they were viewed many times. The number of views may not be the same as the number of viewers, but it is not necessary to decide the precise number of views and the precise number of people who viewed those posts.

2.3. There is an issue about the post alleged on 1 August 2023 in paragraph 19 of the Amended Claim Form. It is clear to me from page 2-3.8 of the Bundle that the Defendant made the post which was alleged on 1 August 2023 but it was taken down quite soon after being posted. The reference in that post to "Monte Carlo" indicates that the Claimant was making the post from Monte Carlo rather than his home state Dubai because Dubai carries certain criminal sanctions for defamatory statements.

2.4. The Claimant was aggrieved by those adverse comments made about it. Accordingly, the Claimant commenced the present proceedings.

### PART 3. THE PRESENT PROCEEDINGS

3.1. By a Claim Form issued on 10 July 2023 the Claimant claimed liquidated damages or penalty of USD 5 million pursuant to Clauses 7 and 9 of the SRCA. Those are the same two provisions as were relied upon by the Claimant in the first action.

3.2. On 4 August 2023, the Claimant amended its Claim Form to add additional posts in July and August 2023. On 15 August 2023, the Defendant served his defence and counterclaim. The Defendant denies that the SRCA remained in force after 1 February 2022, alternatively after 1 February 2023. He asks the Court to make a declaration to that effect. On that basis, it says that the Defendant says there is no liability to the Claimant.

3.3. There was as previously mentioned a Directions hearing on 4 September 2023. At that hearing, I fixed the trial date for 21 November 2023 going over to 22 November 2023 if necessary, as indeed proved to be the case.

3.4. At the Directions hearing Counsel for both Parties said that they did not intend to file expert evidence for the trial. Despite that indication, the Claimant subsequently filed an expert report by Messrs Shaikenov on 11 September 2023. That was one week after the Directions hearing. The Defendant has had ample notice of that expert report. Therefore, although parties really must comply with the rules for getting permission in respect of the expert evidence, I allowed that expert evidence in and took it into account.

3.5. The Defendant wishes to rely upon documents which the Claimant says should not be admitted because they were identified too late. The Claimant has had ample opportunity to consider those documents and so I allow them to go in evidence. The main function of this Court is to do justice between the parties.

3.6. The trial duly commenced yesterday on Tuesday 21 November 2023 with Mr. Tukulov appearing for the Claimant, as he did in the previous action, and Mr. Kholod appearing for the Defendant, as he did in the previous action. Mr. Romanyuk has been attending this trial remotely from Dubai where he lives. Although Mr. Romanyuk was not called as a witness, I allowed him to intervene during the hearing at one point yesterday to assist his Counsel in finding a relevant document. Counsel concluded their submissions yesterday afternoon.

3.7. I have considered the case overnight before giving this judgment today, Wednesday 22 November 2023. A number of issues have been debated during the trial: 1) whether Clause 7 remained in force after 1 February 2022 or 2023; 2) whether the Defendant's posts on social media constituted breaches of Clause 7; and 3) to what remedy is the Claimant entitled. Having identified those issues I must now address them in that order.

### PART 4. FIRST ISSUE: DID CLAUSE 7 OF THE SRCA REMAIN IN FORCE AFTER 1 FEBRUARY 2022 OR ALTERNATIVELY 1 FEBRUARY 2023?

4.1. The Defendant puts his case in two ways. First, he says, properly construed, Clause 7 lapsed after two years. Secondly, and alternatively, he says, the effect of the judgment in the first action was to bring to an end the prohibition contained in Clause 7 on 1 February 2023, the date of judgment.

4.2. In support of his first argument, Mr. Kholod submits that free speech is a basic human right recognised by the United Nations, recognised in the European Convention on Human Rights, and also enshrined in Article 20 of the Constitution. Clause 7 infringes that right, it prohibits the Defendant from disparaging the Claimant. Furthermore, says Mr. Kholod, other provisions of the SRCA are limited in time to two years; see the provisions in that contract about non-competition, non-solicitation of customers, and non-solicitation of employees. Clause 7, he submits, should be read in the same way. It should be limited to two years.

4.3. Mr. Tukulov responds that the wording of Clause 7 is different from the other clauses to which Mr. Kholod refers. It is deliberately different. Whereas those other clauses specified a two-year time limit, Clause 7 says:

*“Non-Disparagement. The Employee agrees and covenants that the Employee shall not at any time make, publish, or communicate to any person or entity or in any public forum any defamatory, maliciously false, or disparaging remarks, comments, or statements concerning any member of the Employer Beneficiary Group or its businesses, practices or activities, or any of its employees, officers, or directors and their existing and prospective customers, suppliers, investors, and other associated third parties, now or in the future.”*

4.4. Mr. Tukulov relies upon the words “at any time”, which appear in lines one and two of that provision, and also upon the phrase “now or in the future”, which appears at the end of that provision. As to the point about basic rights, Mr. Tukulov points out that Kazakhstan is not a party to the European Convention on Human Rights. It is true that Article 20 of the Constitution confers a right of free speech, but Article 1 and Article 8 of the Civil Code enable citizens to waive their rights. That, says Mr. Tukulov, is what the Defendant has done in this case. The Defendant is an experienced and wealthy businessman. He has access to legal advice, if he needed it. He received a substantial payment in return for accepting the restriction in Clause 7. Mr. Tukulov stressed that this Court should enforce commercial contracts made between businessmen.

4.5. I have been troubled about how Article 277 of the Civil Code impacts upon Clause 7 of the SRCA.

Article 277 provides as follows:

*“1. When an obligation stipulates or permits the identification of the date of its execution or a period of time during which it must be executed, the obligation shall be subject to execution on that date or appropriately at any moment within that period.*

*2. In cases where an obligation does not specify the date for its execution and does not contain any conditions which allow identification of that date, it must be executed within a reasonable period after the emergence of the obligation.*

*An obligation which is not executed within a reasonable term, and equally an obligation the term for the execution of which is identified as the moment of claim must be executed by the debtor within seven days from the date of the presentation by the creditor of the claim for its execution unless the duty to execute by any other date ensues from legislation, the conditions of the obligation, traditions of business practice, or the essence of the obligation.”*

4.6. I pressed Mr. Tukulov as to how that Article applied in the present case and what was the reasonable period during which Clause 7 should remain effective in the light of Article 277. Mr. Tukulov submitted that Article 277 only applies to a specific obligation to do something, for example to deliver goods. It does not apply to a continuing obligation of the kind we have in

Clause 7 of the SRCA. In making that submission, Mr. Tukulov gained support from the expert report of Messrs Shaikenov at paragraphs 25 to 49. I have come to the conclusion that Mr. Tukulov's submissions are well-founded. There is a clear distinction between Clause 7, which is a continuing obligation, and the other Clauses to which Mr. Kholod referred in the contract.

- 4.7. By Clause 7, in return for substantial compensation, the Defendant agreed to restrict his right of free speech in relation to commenting on the Claimant's affairs. This was a commercial contract which the parties were entitled to make and which the Court will enforce.
- 4.8. The next sub-issue is this. Did the Court's judgment in the previous action have the effect of bringing the SRCA to an end on 1 February 2023, the date of judgment in that action?
- 4.9. Despite Mr. Kholod's valiant arguments, I cannot see why the previous judgment should have that effect. There is no indication in the previous judgment that it was somehow terminating the parties' agreement. Mr. Kholod said that the Court awarded damages of USD \$ 100,000 for breach of contract that wiped out the payment which the Defendant received on entering the contract. That submission is correct, but it does not assist the Defendant. The Court only awarded damages of USD \$ 100,000 because the Defendant had committed breaches of contract. If the Defendant had abided by the contract, he would have retained the USD \$ 100,000 previously paid to him.
- 4.10. Mr. Tukulov raises a further point. He says that the Defendant never complied with the Court's order to pay the USD \$ 100,000. He fairly conceded that for a large organisation like Freedom Finance, there is always the possibility of overlooking a small receipt, such as USD \$ 100,000. Mr. Kholod says there is evidence that the Defendant did pay. But, says Mr. Kholod, in any event, that point is irrelevant. This Court is dealing with substantive issues, not enforcement. I agree with that submission of Mr. Kholod. Whether or not the Defendant complied with the previous judgment is not relevant to the issues which are currently before the Court in this action.
- 4.11. Although I agree with Mr. Kholod on that aspect of the case, for the reasons stated above, I do not accept that the SRCA or Clause 7 of the SRCA came to an end on 1 February 2022, when two years expired, nor did it come to an end on 1 February 2023, when this Court gave judgment in the first action.
- 4.12. Accordingly, my answer to the question posed in Part 4 of this judgment is yes.

PART 5. SECOND ISSUE: DID THE DEFENDANT'S POSTS ON SOCIAL MEDIA CONSTITUTE BREACHES OF CLAUSE 7?

- 5.1. The Claimant contends that the posts on social media were plainly in breach of Clause 7. The Defendant advances two reasons why they were not. One, they were merely expressions of opinion. Two, the statements were true. Therefore, they are not defamatory, maliciously false, or disparaging.
- 5.2. Let me deal with the first argument. In view of the Directions which I made on 4 September, I will not read out the Defendant's various posts. However, it will be clear to anyone who looks at those posts that they are not mere statements of opinion. They are statements of fact, and they are highly critical of the Claimant. Next, the Defendant contends that those statements are true. That would, of course, be a defence if the Claimant were basing its claim on the terms "defamatory" or "maliciously false". But the Claimant is not relying upon that part of Clause 7.
- 5.3. The Claimant contends that the word "disparaging" is a much wider term. The posts on social



media are disparaging of the Claimant, regardless of whether they are true or false. Mr. Tukulov says, assume hypothetically that all the Defendant's posts are true: they are still disparaging remarks concerning the Claimant. I have come to the conclusion that Mr. Tukulov is correct. He has demonstrated that the Defendant's posts were disparaging. The Claimant has not proved or attempted to prove that those posts were either defamatory or maliciously false.

5.4. Accordingly, my answer to the question posed in Part 5 of this judgment is yes.

#### PART 6. THIRD ISSUE: TO WHAT REMEDY IS THE CLAIMANT ENTITLED?

6.1. The Claimant submits that the Court should award liquidated damages or a penalty, whichever one calls it, in the sum of USD \$ 5 million in accordance with Clause 9 of the SRCA.

6.2. Parts 5 and 6 of the Court's judgment in the previous action between the parties contained an analysis of Clause 9 of the contract. Those parts also contained a discussion about Articles 297 and 351 of the Civil Code. I adopt what the Court said in Parts 5 and 6 of its previous judgment about those matters.

6.3. Mr. Tukulov submits that a crucial distinction between the previous case and this one is that Mr. Turlov has stopped making critical comments about Mr. Romanyuk. Therefore, the Court's observations about lack of good faith in the previous judgment have no application to the present case. I accept that submission.

6.4. On the other hand, as Mr. Kholod points out, that is not the only distinction between that case and the present case. Mr. Kholod draws attention to numerous articles published by CNBC concerning Freedom Finance and Mr. Turlov. Those articles will have had an enormously wide readership. Far more people read articles published by CNBC than read Mr. Romanyuk's posts on social media. Against that background, says Mr. Kholod, the Defendant's posts were of very little consequence. Mr. Kholod also said that the Defendant's posts were true. These are all factors which should lead to a substantial reduction of the penalty imposed by Clause 9. Mr. Kholod proposes that the Court in the exercise of its discretion under Article 297 of the Civil Code should reduce the penalty to USD \$ 1 in order to express the Court's disapproval of the Claimant's conduct.

6.5. Mr. Tukulov submits that under Article 351 of the Civil Code, a penalty clause such as Clause 9 of the SRCA has two purposes, namely to compensate and also to punish. I accept that submission on the basis of the expert evidence in the previous trial: see paragraph 5.11 of the previous judgment. Mr. Tukulov submits that the previous award of USD \$ 100,000 was an insufficient penalty. It has not deterred the Defendant from continuing to commit breaches of Clause 7. Mr. Tukulov also submits that Mr. Romanyuk is the source of all CNBC articles on pages 6.1 to 6.34 of the second bundle of documents. This bundle is entitled "Disputed Documents" because the Claimant sought unsuccessfully to persuade the Court not to look at them.

6.6. I have read the CNBC articles. As Mr. Kholod says, it is clear that CNBC has been basing its articles on many sources. It may well be that the Defendant is one of those sources, although that has not been specifically proved. If the CNBC articles are true, then they provide support for the Defendant's posts. Mr. Tukulov commented that the CNBC articles say the same sort of things as Mr. Romanyuk's posts. Mr. Tukulov also submitted that the CNBC articles reflect some American prejudice against financial companies operating out of Kazakhstan.

6.7. I find this issue extremely worrying. I do not know whether the CNBC articles and Mr. Romanyuk's



posts are true or not. There is no evidence before the Court to enable it to reach a conclusion on those matters. If they are true, this Court would hardly be acting in the public interest by punishing a party for exposing wrongdoing in the financial sector. But they may not be true. Also, it is the role of this Court to enforce commercial contracts freely entered into, unless an illegal purpose has been proved, which is not the case here. Even if the Defendant put no posts on social media, the CNBC articles would still be in the public's domain, and they would still be widely read. That, of course, mitigates the significance of the Defendant's posts.

6.8. I have come to the conclusion that the Defendant has entered into a commercial bargain whereby he will have to pay a substantial sum if he makes public statements disparaging Freedom Finance. At the time of entering the bargain, the Defendant well knew whether or not there were grounds for criticising Freedom Finance and the way it did its business. The Defendant has made it clear that he is determined to publicly criticise Freedom Finance and that he is willing to take the financial consequences. The Defendant does not need to go on publicly criticising Freedom Finance. CNBC is doing that work for him.

6.9. I have weighed up all the conflicting considerations. I have also taken into account the general principles which govern the operation of Article 297 of the Civil Code, as set out in this Court's previous judgment.

6.10. Having carried out that exercise, I conclude that the penalty of USD \$ 5 million specified in Clause 9 of the SRCA is excessively large compared to the losses caused to the Claimant by the Defendant's breaches. After considering the interests of the Claimant and Defendant that deserve attention, in accordance with Article 297 of the Civil Code, I reduce the amount of penalty which the Defendant must pay for breach of Clause 7 to USD \$ 100,000. I award damages in that sum. I order that Mr. Romanyuk do pay the damages ordered within 28 days.

#### **ORDER ON COSTS**

1. This is an application for costs.
2. Most unfortunately, notice of the costs application was not sent to the Court or to the Defendant's lawyer until 9:45 am Astana time this morning. When either party intends to apply for costs, they should send a proper notice of that application and details of the costs that they are seeking in good time well before the day when Judgment will be given.
3. Secondly, it was especially unfortunate that the Claimant did not make the application for costs when Judgment was handed down. As it was, I have had to come back into Court half an hour later and to deal with it; that holds up the next case in the Court's list and it means that Mr. Kholod, who was about to leave the building, had to come back into Court to deal with it.
4. The Court will mark its disapproval of the late notification of its cost claim. Apart from those matters, the Claimant has only been partially successful in its claim. The Claimant has succeeded on liability, but has only recovered USD \$ 100,000, not USD \$ 5 million, as claimed.
5. Taking all these matters into account, I assess costs in the reduced sum of USD \$ 8,000. I direct that that sum be paid to the Claimant in the same period that I specified before, namely 28 days.





By Order of the Court,

Sir Rupert Jackson,  
Justice, AIFC Court

Representation:

The Claimant was represented by Mr. Bakhyt Tukulov, Tukulov & Kassilgov Litigation LLP, Almaty, Republic of Kazakhstan.

The Defendant was represented by Mr. Alexey Kholod, "Assistent Plus" International Law Firm, Moscow, Russian Federation.

IN THE COURT OF FIRST INSTANCE  
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

4 September 2023

CASE No: AIFC-C/CFI/2023/0023

FREEDOM FINANCE JSC

Claimant

v

MR. EGOR ROMANYUK

Defendant

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JUDGMENT  
ON AN APPLICATION FOR SECURITY FOR COSTS  
AND  
ON AN APPLICATION FOR THE TRIAL TO BE HELD IN PRIVATE

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Justice of the Court:  
Justice Sir Rupert Jackson

**JUDGMENT**  
**ON AN APPLICATION FOR SECURITY FOR COSTS**

1. This is the Claimant's application for security for costs in respect of the counterclaim, in the long running litigation between Freedom Finance JSC and Mr. Egor Romanyuk.
2. I gave judgment in the first action earlier this year in AIFC Court Case No. 20 of 2022 Freedom Finance JSC v. Mr. Egor Romanyuk. The second action is now under way. In this second action, as in the first action, the Claimant is seeking payment of a substantial sum said to be due under the terms of a Separation and Release of Claims Agreement, which was entered into by the Parties following the termination of the Defendant's employment by the Claimant. The Defendant denies that he is in breach of contract. The Defendant denies that the sum claimed is due. In the present case, unlike the previous case, he seeks to advance a counterclaim, effectively to invalidate the Separation and Release of Claims Agreement.
3. As I see it, the arguments in the counterclaim (and whether they are sound or unsound is not for decision today) are essentially bound up with the Defence. This is not a case in which the Defendant is advancing a free-standing counterclaim, seeking some remedy unrelated to the claim. On the contrary, the Defendant is advancing a counterclaim, which is in essence another form of Defence to the claim. If the counterclaim succeeds, then the Claimant cannot recover the sum claimed as due under this contract.
4. Applications for security for costs arise in many circumstances. They often happen in litigation before domestic courts. They arise in arbitral proceedings and they arise in proceedings before international commercial courts such as this one.
5. There are certain general principles, which are emerging as part of the *lex mercatoria*, which tribunals and courts have regard to across the world in both common law and civil law jurisdictions. One principle is that when a defendant faces a claim, the defendant must have a proper opportunity to defend himself or itself against that claim, and orders for security for costs should not inhibit the defendant from advancing its defence.
6. There can be orders for security for costs in respect of counterclaims. I have made such orders both when sitting as a judge in court and when sitting as an arbitrator in international arbitrations. Such orders may be made in appropriate circumstances, if there are grounds to doubt that the costs of resisting the counterclaim will be satisfied (in the event that the counterclaiming party fails) and where that counterclaim is a free-standing claim.
7. In this case the Claimant has advanced respectable arguments for security for costs. The Defendant is outside the jurisdiction of Kazakhstan. There is a dispute as to whether or not the Defendant has paid the money due under the previous Judgment of this Court. But the Claimant faces the difficulty in this case that the counterclaim advanced by Mr. Romanyuk is in essence another variant of his defence to the claim. If this Court were to make an order for security for costs on the counterclaim that would have the effect, if the order is not obeyed, of preventing Mr. Romanyuk from advancing his full defence to the claim.
8. In these circumstances, I give no indication about the merits of the parties' cases. These will be examined at trial in the usual way with the assistance of two very able advocates, both of whom I have heard from before. But I must not make an order today, which would inhibit the presentation of the whole of Mr. Romanyuk's defence.

9. In these circumstances this application for security for costs is refused.

### **JUDGMENT**

#### **ON AN APPLICATION FOR THE TRIAL TO BE HELD IN PRIVATE**

1. The Claimant applies for the trial to be held in private. The Defendant opposes this application.
2. Mr. Tukulov, for the Claimant, argues that as a result of the activities of the Defendant, journalists have been publishing articles which caused damage to the Claimant's reputation and led to a drop in the Claimant's share price. Mr. Kholod, for the Defendant, says that the Defendant has no responsibility for anything that may have been published and a lot of the matters in this case are already in the public domain. It will achieve nothing to hold the hearing in private for that reason. Also, he says, his client wants a hearing in open court so that anybody can listen to the proceedings. It is true that open justice is an important principle upon which this Court proceeds, although there is power under the Court's Rules to make an order for a hearing in private in appropriate circumstances.
3. I do not think that this is a case in which the Court ought to order a hearing in private. First, the previous hearing was not ordered to take place in private. I was very careful at the hearing not to read out the allegedly malicious and untruthful comments made by Mr. Romanyuk against the Claimant. I merely referred to the relevant passages in the documents. The same procedure can be adopted at the trial this time. Counsel need not read out the relevant passages. They may simply direct the Court to a relevant passage in the documents and say that it is a disparaging statement about the Claimant which ought not to be made in public.
4. In my judgment last time, I was careful not to set out the disparaging statements but merely identified them by reference to the documents. To some extent, the issues between the Parties are already in the public domain. Mr. Tukulov has told me about a report called the "Hindenburg report" which makes public many allegations against the Claimant. Whether it is quoting the Defendant or someone of the same mind as the Defendant, I do not know. But the dispute between the parties is already generally known. The judgment which this Court gave on the last occasion is on the Court's website.
5. If we were to hold the next hearing in private, it would actually arouse suspicion. People would say: "What is happening this time which prevents the Court sitting openly as it did before?" In my view, holding the hearing in private would achieve very little. A hearing in open court can be conducted in the same way that it was conducted last time. I also attach great weight to the principle of open justice. Cases should proceed in open court unless there is a really good reason to hold them in private.
6. In all the circumstances, I direct that this trial shall be held in open court, but that the disparaging comments referred to by the Claimant in his Claim Form and possibly by the Defendant in his Defence and Counterclaim should not be read out in Court. They can be merely referred to by page number or paragraph number in the documents. My judgment will adopt the same approach.
7. The application for a hearing in private is refused.

By Order of the Court,

Sir Rupert Jackson,  
Justice, AIFC Court

**Representation:**

The Claimant was represented by Mr. Bakhyt Tukulov, Tukulov & Kassilgov Litigation LLP, Almaty, Republic of Kazakhstan.

The Defendant was represented by Mr. Alexey Kholod, “Assistent Plus” International Law Firm, Moscow, Russian Federation.



IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

8 November 2023

CASE No: AIFC-C/SCC/2023/0022

PRIVATE COMPANY AURORA GEOPHYSICS LTD

Claimant

v

METEOR MINING COMPANY KZ (CONDUIT 21) LTD

Defendant

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JUDGMENT

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Justice of the Court:

Justice Tom Montagu-Smith KC

## ORDER

1. **The Defendant shall pay the Claimant the sum of KZT 47,322,067 by 4pm on 22 November 2023.**

## JUDGMENT

1. In this claim, the Claimant seeks to recover sums due under three contracts for the provisions of geophysical services ("the Contracts"), numbered 225AG-2021, 252AG-2021 and 253AG-2021. Under the terms of the Contracts, the Claimant agreed to carry out geophysical surveys at three sites in the Zhana Arka District of the Karagandy Region of Kazakhstan. The first was concluded on 1 September 2021 and was amended on 28 September 2021. The other two contracts were undated but, according to the Claimant, were entered into on 22 October 2021.
2. Under the terms of the Agreements, the Defendant was obliged to pay a total of KZT 38,154,060 for the services as follows:
  - a. Under Contract 225AG-2021 (as amended), KZT 16,061,661.54;
  - b. Under Contract 252AG-2021, KZT 17,864,000;
  - c. Under Contract 253AG-2021, KZT 9,094,400.
3. By clause 3.1.1 of the Contracts, the Defendant was obliged to pay 40% of the sums due within 5 business days of signing the Contract. Subsequent payments were due within 5 business days of the parties signing a certificate of completion.
4. By clause 6.3 of the Contracts, late payment resulted in a penalty being imposed on the Defendant of 0.1% of the total amount of the Contract for each day of delay, up to a maximum of 10%.
5. The Contracts contained a jurisdiction agreement in favour of the Specialized Interdistrict Economic Court of Astana.
6. On 14 April 2022, the parties signed a certificate of completed works for each of the Contracts. The sum certified in each case was the full Contract sum referred to at paragraph 2 above. Despite this, the Defendant paid nothing for the works.
7. On 16 June 2023, the Claimant sent the Defendant a notice setting out its claim. The notice stated the sums due under the Contracts and that the Defendant had accepted the works. It demanded payment within 5 business days. The notice was signed by both parties. It appears that the Defendant's signatory added the words "*Acknowledged with pending deliverables (i.e. final geophysical reports)*".
8. No payment was made in response to the notice. As a result, the Claimant brought a claim in Specialized Interdistrict Economic Court. The Court however rejected the claim on grounds of jurisdiction, finding that the AIFC Court should hear the case as both parties are AIFC Establishments.
9. The Claimant therefore subsequently brought this claim in the AIFC Courts.
10. The Defendant filed a Defence. In it, the Defendant asserts that the Claimant proposed the works when it knew that the Defendant had no funds to pay. It is said that the Contracts were signed later, after work was carried out. The Defendant says that the works were carried out when both parties were

underoccupied as a result of Covid-19. The Defendant claims it has not received the completed reports from the Claimant and that, although it was not “stepping back” from the parties’ “mutual understanding”, that was nevertheless “conditional and required those reports that were going to help us get funded as Meteor was initially led to believe, to be handed to Meteor, giving it a chance to ‘at least’ review them”.

11. It was unclear whether the Defence was intended to raise any genuine dispute. On 28 September 2023, I therefore directed the Defendant to file any further or amended defence, setting out what was and was not disputed, together with any documents on which the Defendant relied. The Defendant did not respond. The Claimant responded to the directions indicating that it preferred a decision on the papers, without a hearing.
12. By AIFC Court Rule 28.39, the AIFC Court may decide a claim without a hearing. I consider that is appropriate in this case. The Defendant has been given every opportunity to submit a defence and evidence in support, but has produced only the Defence.
13. I do not consider that the Defence raises any matters which could amount to a defence to this claim.
14. The Defendant accepts that it concluded the Contracts. The assertion that this was “conditional” on the delivery of reports is unclear. The Contracts themselves were not conditional on the production of reports, as a matter of logic. The production of the reports was the subject of the Contracts. Nor were payments conditional. The Contractual terms set out the timing of payments. The Defendant signed the completion certificate and acknowledged the claim, albeit “with pending deliverables”. I do not know whether the reports were delivered. However, whether or not they were, the Contract sums fell due.
15. In the circumstances, I find that the sums claimed are clearly due from the Defendant to the Claimant and make an order accordingly. The sums have been overdue by more than 100 days. As a result, the full 10% penalty has accrued under clause 6.3 of each Contract.
16. In the circumstances, the Defendant is obliged to pay the Claimant the full sum claimed, being KZT 47,322,067, comprised of:
  - a. The principal sums due under the Contracts, amounting to KZT 43,020,061; and
  - b. The penalty of 10% of the Contract sums, being KZT 4,302,006.
17. The total sum claimed was KZT 47,325,067. It is not clear to me why the claim is KZT 3,000 more than the total due under the Contracts. This may be the result of an arithmetical error on the part of the Claimant. The Claimant has claimed its costs arising from this claim. The additional sum of KZT 3,000 may be due to that. However, I have seen nothing to support a costs claim and costs are not ordinarily recoverable in the Small Claims Court. In the circumstances, I award only the sums due under the Contracts.

By Order of the Court,

Justice Tom Montagu-Smith KC,  
Justice, AIFC Small Claims Court





Representation:

The Claimant was represented by Mr. Nariman Omarov, legal counsel, Aurora Geophysics Ltd., Astana, Kazakhstan.

The Defendant was represented by Mr. Hamza Mete Izmen, CEO/Director, METEOR MINING COMPANY KZ Ltd., Astana, Kazakhstan



IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

25 July 2023

CASE No: AIFC-C/CFI/2023/0021

MR RISKULOV RUSTAM

Claimant

v

MS NURTASSOVA ARAI

Defendant

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JUDGMENT

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Justice of the Court:

Justice Thomas Montagu-Smith KC

## ORDER

1. **The AIFC Court has no jurisdiction over the claim.**
2. **The Claim Form is set aside.**

## JUDGMENT

### Introduction

1. On 23 December 2022, I gave judgment (*“the Judgment”*) in favour of the Claimant, Mr Riskulov, against Grantly LLP, a company based in Almaty. The Judgment has not been satisfied. Mr Riskulov obtained an execution order and appointed a bailiff, who has taken various steps to enforce the Judgment, without success.
2. Ms Nurtassova is the shareholder and director of Grantly LLP. According to Mr Riskulov, she has abandoned the company and now provides professional services and runs a business as an individual.
3. On 19 June 2023, Mr Riskulov brought this claim against Ms Nurtassova. He claims that she has *“subsidiary liability”* for the debts of the company, under various provisions of the Kazakhstan Civil Code and under its bankruptcy law.
4. The particular provision of the Civil Code on which Mr Riskulov relied was Article 44(3). This imposes *“subsidiary liability”* on a *“founder”* or on an *“official”* of a company if the founder or official causes *“intentional bankruptcy”* or *“false bankruptcy”* of the company.
5. In argument on 25 July 2023, Mr Riskulov explained that, in fact, he does not allege that Ms Nurtassova caused the intentional bankruptcy of Grantly LLP. He said that he considered that Ms Nurtassova should have placed Grantly LLP into bankruptcy proceedings within 6 months of the Judgment being issued. Ultimately, the precise legal basis on which Mr Riskulov claimed that Ms Nurtassova should be responsible for Grantly LLP’s debts was not clear to me by the end of the hearing.

### The parties’ submissions

6. I heard from both parties at a hearing on 25 July 2023.
7. Both in advance of the hearing and at the hearing, I asked Mr Riskulov to explain the basis on which he contended that the AIFC Court had jurisdiction. In response, Mr Riskulov relied on Article 13(4)(3) of the AIFC Constitutional Statute, which provides:

*“The AIFC Court has exclusive jurisdiction in relation to the hearing and adjudication of the following disputes...:  
(3) disputes transferred to the AIFC Court by agreement of the parties.”*

8. This provision is further explained by Article 26(3) of the AIFC Court Regulations as follows:

*“The reference to “transferred to the Court by agreement of the parties” in this Article applies to all parties, including parties not registered in the AIFC, such that all parties may “opt in” to the jurisdiction of the Court by agreeing to give the Court jurisdiction pre or post-dispute.”*

9. What is required is an agreement pursuant to which the parties have agreed that the dispute in question may be heard in the AIFC Courts. Such agreements are occasionally reached after the dispute has arisen. However, it is far more frequently the case that jurisdiction agreements are agreed in advance and cover any disputes arising under or in relation to the contract in which the jurisdiction agreement is found.
10. In the present case, Mr Riskulov relies on the jurisdiction agreement in the contract he entered into with Grantly LLP. As I set out in the Judgment, that contract contained a jurisdiction agreement in favour of the AIFC Courts. Mr Riskulov’s position was that the present claim was caught by the terms of that agreement. This was because Ms Nurtassova had signed the contract on behalf of Grantly LLP. Mr Riskulov further said that he was not claiming against Ms Nurtassova personally, but as a result of her status and relationship with Grantly LLP.
11. Mr Riskulov considered that it would be unfair to allow Ms Nurtassova effectively to abandon Grantly LLP, leave its debts unsatisfied, but to continue to carry on her business independently as an individual. He made the point – forcefully – that judgments are only valuable if they can be enforced. Mr Riskulov is not currently living in Kazakhstan and, he says, there would be practical problems for him in bringing bankruptcy proceedings against Grantly LLP in the civil courts in Almaty where, he said, there would be significant “*bureaucracy*” which would take time.
12. For her part, Ms Nurtassova said that the AIFC Court had no jurisdiction. She had not signed a contract with Mr Riskulov personally.
13. On the subject of the Judgment, Ms Nurtassova said that both she and Grantly LLP were already the subject of significant enforcement measures. Grantly LLP’s accounts have been blocked and Ms Nurtassova is currently not permitted to travel. She wants to resolve the problem. However, she does not consider that it is fair that she simply be held responsible for Grantly LLP’s debts.
14. At one stage, Ms Nurtassova stated that she had been unable to defend Grantly LLP in the proceedings which led to the Judgment, because case documents had been sent to her personal email address and she had not seen them. She also said that she did not consider that as much as US\$35,000 was owed to Mr Riskulov. Mr Riskulov disputed that Ms Nurtassova had been unaware of the case. However, nothing turns on this. Ms Nurtassova confirmed that she has known about the Judgment since it was made in December 2022 and she has not applied to set it aside. In the circumstances, there is a debt of US\$35,000 owed under the Judgment.

#### Decision

15. In my view, it is quite clear that the AIFC Court does not have jurisdiction under the provision relied on by Mr Riskulov. Article 13(4)(3) of the Constitutional Statute requires an agreement between the parties to the proceedings that the dispute advanced in the claim should be heard in the AIFC Court.

Contrary to Mr Riskulov's submission, this quite clearly is a claim made against Ms Nurtassova personally. In any event, the parties to the claim are Mr Riskulov and Ms Nurtassova. Mr Riskulov accepts that he has no contract at all with Ms Nurtassova. In the circumstances, the jurisdiction gateway relied on is not satisfied.

16. Neither Mr Riskulov nor I have been able to identify any other basis on which this Court could exercise jurisdiction over this claim. In the circumstances, I find that the Court has no jurisdiction.
17. I have some sympathy with Mr Riskulov's position. He is right that judgments are only of value if they are enforced. However, it is not the general rule that directors or shareholders of companies are liable for the debts of the company. The general rule is the opposite. There are exceptions to that general rule. What they are and whether they are established on the facts will be matters to be resolved in the appropriate forum. In my view, that is most likely to be the Civil Courts in Almaty, where both Grantly LLP and Ms Nurtassova are based.
18. As I have noted, Ms Nurtassova remains the subject of some relatively onerous restrictions as a result of the measures taken to enforce the Judgment. As I said to her at the hearing, it may be in her interests to try to bring things to a conclusion. Whether that be by taking steps to place Grantly LLP into bankruptcy, by meeting some or all of its debts herself, or through some other means will be a matter for her.
19. None of that, however alters the conclusion that this Court has no jurisdiction to entertain this claim.

By Order of the Court,

Justice Thomas Montagu-Smith KC,  
Justice, AIFC Court

Representation:

The Claimant was represented by himself.

The Defendant was represented by herself.



IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

24 July 2023

CASE No: AIFC-C/CFI/2023/0020

PRIVATE COMPANY AURORA GEOPHYSICS LTD

Claimant

v

METEOR MINING COMPANY KZ (CONDUIT 22) LTD

Defendant

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JUDGMENT

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Justice of the Court:

Justice Thomas Montagu-Smith KC

## ORDER

1. **The Defendant shall pay the Claimant the sum of KZT 35,605,706.**

## JUDGMENT

1. In this claim, the Claimant seeks to recover sums due under five contracts for the provisions of geophysical services (*"the Contracts"*). The Contracts, numbered 235AG, 236AG, 237AG, 258AG to 259AG, were all on similar terms. The first three were entered into on 17 September 2021. The last two on 17 November 2021. Under the Contracts, the Claimant agreed to carry out geophysical surveys at various sites in the Bayanaul District of the Pavlodar Region.
2. The works were duly carried out. On 14 April 2022 and on 1 June 2022, the signed certificates, certifying completion of the works.
3. Under the terms of the Agreements, the Defendant was obliged to pay a total of KZT 38,154,060 for the services as follows:
  - a. Under Contract 235AG, KZT 3,413,760;
  - b. Under Contract 236AG, KZT 13,655,040;
  - c. Under Contract 237AG, KZT 3,413,760;
  - d. Under Contract 258AG, KZT 7,114,500;
  - e. Under Contract 259AG, KZT 10,557,000.
4. According to the Claimant, by 16 June 2022, nothing had been paid. The Claimant therefore sent a demand to the Defendant on that date.
5. The Defendant eventually paid KZT 6,363,760 in late 2022. In correspondence, the Defendant acknowledged the debt was due, but sought time for payment. The Claimant's position is that the Defendant never had any genuine intention to pay. However, there is no need to decide that allegation in this case.
6. The Agreements contained a jurisdiction clause in favour of the Specialized Interdistrict Economic Court of Nur-Sultan. The Claimant brought a claim in that Court. However, it was ultimately rejected on grounds of jurisdiction. The Court found that the AIFC Court should hear the case as both parties are AIFC Establishments.
7. The Claimant therefore subsequently brought this claim in the AIFC Courts, seeking recovery of the debt, being KZT 31,790,300. The Claimant also seeks KZT 3,179,030 by way of penalty due under clause 6.3 of each contract. That clause entitles the Claimant to recover 0.1% per day of delay in payment, up to a maximum of 10% of the Contract sum. Once the fees are more than 100 days overdue, the maximum 10% has accrued.

8. The Defendant filed a Defence. The Defence appeared to acknowledge the existence of “*the debt*”, but did not respond directly to the claim set out in the Claim Form. Instead, the Defence raised a number of points.
9. First, the Defendant pointed out that there was an error in the name used for the Defendant in the Claim Form. The Defendant had been described as “*Meteor Mining Company Ltd (Conduit 22)*”.
10. The Claimant has subsequently confirmed that it would like to amend the name for the Defendant to its correct name, Meteor Mining Company KZ (Conduit 22) Ltd. I will treat the Claim Form as having been amended accordingly.
11. Second, the Defendant indicated that it was hoping to raise money by selling (or possibly obtaining finance against) its licences.
12. There is some suggestion in the Defence that survey reports were not provided or were not provided on time. However, no evidence was submitted to support that and it is far from clear what effect the Defendant says that would have on the debt.
13. In the circumstances, on 12 July 2023, I directed the Defendant to file and serve any further or amended defence on which it relied, setting out which allegations in the Claim Form it admitted, which it denied and setting out the basis for any denials. The Defendant was required at the same time to file and serve any documents, witness statements or other evidence on which it relied.
14. On 19 July 2023, the Defendant filed a further Defence. In it:
  - a. The Defendant stated, in effect, that all parties expected the Defendant would fund the fees due from finance raised against its licences;
  - b. The Defendant accepted that it has paid only “*6m + KZT*” under the Contracts;
  - c. The Defendant asserted various difficulties it has had in raising the cash needed to make the payments. The Defendant said “*Had [the Defendant] been able to manage to find the necessary funds, these outstanding debts would have already been paid... because [the Defendant] never contested against paying [the Claimant’s] rendered services.*”
  - d. The Defendant stated that it had not received “*proper signed reports*”;
  - e. The Defendant said that it fully intends to pay for the services, but that in exchange it should receive “*any outstanding deliverables*” under the Contracts.
15. The Defendant did not serve or file any supporting evidence with its second Defence.
16. The Claimant has indicated that it would like this case to be decided on the papers. The Defendant has said “*we are in favour of a hearing should the honourable judge of AIFC deem necessary to question any of the above said in further detail and/or wanted to hear even more.*”



17. The Small Claims Court has a general discretion to dispose of cases without a hearing: AIFC Court Rule r.28.39. Ordinarily, I would be reluctant to do so where one party requests a hearing. In this case, however, I consider that it would be appropriate to make a decision on the papers.
18. The Defendant has not clearly requested a hearing. It has said only that it would be “*in favour*” of a hearing if the Judge deems it necessary.
19. I do not deem it necessary to have a hearing. I can see no benefit in having a hearing. The Defendant admits the debt exists and does not deny any of the figures provided by the Claimant. It has certified the completion of the works and accepts that it has only paid “*6m+ LZT*” towards the sum due.
20. None of the matters raised by the Defendant would alter the existence or size of the debt. The fact that a party is unable to pay a debt is no defence. The Defendant’s claim that reports have not been delivered is not properly explained and is unsupported by evidence. In any event, it is far from clear that it could alter what was due. Nor is that even asserted by the Defendant, who accepts the existence of the debt.
21. In the circumstances, I find that the sums claimed are clearly due from the Defendant to the Claimant and make an order accordingly. The sums have been overdue by more than 100 days. As a result, the full 10% penalty has accrued.

By Order of the Court,

Justice Thomas Montagu-Smith KC,  
Justice, AIFC Court

Representation:

The Claimant was represented by Mr. Nariman Omarov, legal counsel, Aurora Geophysics Ltd., Astana, Kazakhstan.

The Defendant was represented by Mr. Hamza Mete Izmen, CEO/Director, METEOR MINING COMPANY KZ Ltd., Astana, Kazakhstan

IN THE COURT OF FIRST INSTANCE  
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

26 June 2023

CASE No: AIFC-C/CFI/2023/0019

“KAMKOR MANAGEMENT” LLC

v

Claimant

INTERNATIONAL ARBITRATION CENTRE OF THE  
ASTANA INTERNATIONAL FINANCIAL CENTRE

Defendant

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JUDGMENT

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Justice of the Court:  
The Rt. Hon. The Lord Faulks KC

### **JUDGMENT**

1. The Claimant in this application seeks to challenge the appointment of an arbitrator, Ms Kenjebayeva.
2. The IAC made the appointment and then, by letter (“the Decision letter”) dated 28<sup>th</sup> April 2023, the IAC Chairman, Thomas Krummel, gave reasons for confirming the appointment in the face of objections from the Claimant.
3. The Claimant applies to this Court under Article 22(3) of the Arbitration Regulations to challenge the appointment.
4. Having considered the documents submitted on behalf of the Claimant, including the Amended Claim Form, and the Decision letter, I am not satisfied that there are sufficient grounds to challenge the appointment. Accordingly, I reject the application.

By Order of the Court,

The Rt. Hon. The Lord Faulks KC,  
Justice, AIFC Court

#### **Representation:**

The Claimant was represented by Mr. Bakhyt Tukulov, Tukulov & Kassilgov Litigation LLP, Almaty, Republic of Kazakhstan.

**IN THE COURT OF FIRST INSTANCE  
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE**

**7 November 2023**

**CASE No: AIFC-C/CFI/2023/0018**

**KANIYA BIZHANOVA**

**Applicant**

**v**

**CENTER FOR SCIENTIFIC AND TECHNOLOGICAL INITIATIVES LTD.**

**Respondent**

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**JUDGMENT**

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**Justice of the Court:  
The Rt. Hon. Sir Jack Beatson FBA**

## ORDER

Ms Kaniya Bizhanova (“the Applicant”) is entitled pursuant to Rule 29.6(1) of the AIFC Court Rules 2018 to argue that the Judge erred in finding that she is only entitled to 7 days’ notice of the termination of her contract and that she should have been given 30 days’ notice. Permission to appeal on the remaining issues is reserved to the Court hearing the appeal.

## JUDGMENT

### I. Introduction:

- 1 This application, filed on 11 September 2023, by Ms Kaniya Bizhanova (“Ms Bizhanova”) is for an extension of time in which to appeal and for permission to appeal against the judgment and order dated 24 March 2023 of Justice Charles Banner KC sitting in the Small Claims Court of the Astana International Financial Centre (“the SCC”) in AIFC Court Case No. 28 of 2022. Ms Bizhanova claimed that her former employer, the Center for Scientific and Technological Initiatives Ltd. (“the CFSTI”), wrongly terminated her contract of employment as its Financial Director-Chief Accountant as of 26 July 2022 in a Notice of Termination and an Order both dated 3 August 2022. It had previously ordered the termination of the contract as of 21 July 2022 in an Order dated 21 July 2022.
- 2 The Judge found largely in favour of the CFSTI. He held that Ms Bizhanova’s claim succeeded only to the extent that the CFSTI was liable to pay her the sum of 747 866,75 KZT and dismissed all other parts of her claim. The background to the case and the SCC’s analysis and conclusions are contained in its judgment. The AIFC legislation that is relevant to this application are the AIFC Employment Regulations No. 4 of 2017, hereafter the “Employment Regulations”, and the AIFC Court Rules 2018, hereafter the “Court Rules”.
- 3 Regulation 15 and 60(2) of the Employment Regulations, respectively on probation and rights to minimum notice, are material to this application. Regulation 15 provides:
  - (1) *“An Employer may require an Employee to undergo a probationary period, if the probationary period does not exceed 3 months and is specified in the Employee’s Contract of Employment.*
  - (2) *During the probationary period either the Employer or the Employee may terminate the Contract of Employment without cause on 1 week notice to the other or for cause without notice.”*

The material parts of Regulation 60(2) provide:

*“Subject to subsection (5),<sup>1</sup> if the Employee has been continuously employed by the Employer for 1 month or more, the notice required to be given by the Employer or Employee to terminate the Employee’s employment must not be less than:*

*(a) 7 days, if the period of continuous employment is less than 3 months; or*

*(b) 30 days, if the period of continuous employment is at least 3 months but less than 5 years; ...”*

- 4 Part II of this judgment summarises the decision of the SCC. Part III explains the material parts of the regime for applying for permission to appeal against a decision, the time limits for so doing, and whether

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<sup>1</sup> Subsection (5) provides that subsection (2) does not apply if the employment is terminated during the probationary period under section 15(2),

time should be extended in the present case. Part IV summarises the grounds Ms Bizhanova has advanced in support of her application and CFSTI's statement in opposition to it. Part V sets out my conclusion and the reasons for it.

## **II. The decision of the SCC:**

- 5 The judge stated at [4] that CFSTI resisted the claim in its entirety principally on the basis that it was entitled to terminate Ms Bizhanova's employment. This was either because:

- (a) she had committed a repudiatory breach of contract by having failed properly to give notice of her sick leave for a significant period of 19 days during July 2022, entitling it to dismiss her without notice under regulation 61 of the Employment Regulations, or
- (b) the termination happened during her three-month probation period under regulation 15(2) of the Employment Regulations which entitled it to dismiss her with one week's notice.

In relation to the period of sick leave in July 2022, Ms Bizhanova has provided two Medical Reports dated 7 and 26 July stating that she was temporarily unable to fulfil her duties and was released from work between 7 and 25 July 2022. Those reports, which are before me, state that between 7 and 14 July this was because of acute tonsillitis (ICD-10 Code J03.8) and between 14 and 25 July it was because of acute upper respiratory infection, iron deficiency anaemia and simple chronic bronchitis (ICD-10 Codes J06.9, D50.8 and J41.0).

- 6 The Judge stated at [8] that much of the argument before him focused on Ms Bizhanova's assertion that she was not provided with a written Contract of Employment within the two-month time scale provided for by regulation 11 of the Employment Regulations and that the version of the contract upon which CFSTI relied contained a false signature. He refused to appoint a joint handwriting expert to resolve the question of the authenticity of Ms Bizhanova's signature as she requested, and CFSTI did not oppose. He stated at [8] and [9] that the objective of the SCC is to provide a fast track streamlined means of determining small claims, that it is clear from Rules 28.27 and 28.28 of the Court Rules that appointing an expert would be exceptional, and that it was not necessary to appoint a joint handwriting expert for the determination of Ms Bizhanova's claim. His reasons were:

*"[10] First, even if taking the purportedly signed written contract at face value, the burden of proof would be on the Defendant, if it wished to justify the dismissal of the Claimant without notice, to persuade the Court that the Claimant had committed a repudiatory breach of the contract: see Regulation 61(2)(b) of the Employment Regulations. The Court is not satisfied that the Defendant discharged this burden of proof on the evidence presented. Although Regulation 34(1) of the Employment Regulations makes clear that the entitlement to sick pay is contingent on the employee giving the employer the notice provided for by Regulation 33, there is nothing in either of these regulations, or in Regulation 61, to indicate that the failure to give such notice is, of itself, sufficient not only to disentitle the employee to sick pay but also to amount to a repudiatory breach of contract so as to justify dismissal without notice. The Court therefore rejects the Defendant's assertion that it was entitled to dismiss the Claimant without notice. The Court also rejects the Defendant's associated assertion that the Claimant orally agreed to her dismissal in these circumstances. There is no clear evidence of such oral agreement and the Court is unconvinced, on the balance of probabilities, that such an important agreement would not have been recorded in writing in a form signed or otherwise agreed by both parties."*

*"[11] Secondly, as both representatives confirmed at the hearing, it is undisputed that the termination happened during the first three months of the Claimant's employment. Regulation*

*15 of the Employment Regulations is clear that an Employer may require an Employee to undergo a probationary period not exceeding three months during which the Employer may terminate the Contract of Employment with one week's notice. The dispute about whether and when the Claimant was provided with, and/or agreed, a Written Contract of Employment in this case goes nowhere on this point, because it is clear from Regulation 15 that it is entirely up to the Employer whether to include a probation clause in the Contract. Therefore, there are only two plausible possibilities on the facts of this case in light of the evidence presented to the Court: either (1) the Defendant included within the terms of the Employment Contract a three month probation clause pursuant to Regulation 15; or (2) if the Defendant so required, as it was entitled to do, the Claimant did not agree to such a clause in which case there was no Contract of Employment in the first place. The Court therefore finds on the balance of probabilities that, whatever the precise terms of the Employment Contract between the parties, as a minimum it would have included a three-month probationary period as provided for by Regulation 15 of the Employment Regulations. On that basis, the Defendant was able lawfully to terminate the Contract of Employment with one week's notice at the time when it purported to do so."*

- 7 The Judge found at [12] that *"on this basis ... the Contract of Employment in this case was lawfully terminated, irrespective of whether or not the purported signature on the Written Contract was a fraud as contended by the Claimant"*. He dismissed the claim that CFSTI had acted unlawfully in terminating Ms Bizhanova's employment but ordered it to pay her damages of 336 666,75 KZT in respect of the one week's notice period to which she was entitled during her probationary period: see [13] and [18]. The Judge also ordered it to refund 411,200 KZT which it had deducted from her salary on the ground that she had made errors in her job in relation to procurement procedures because he found at [15] and [16] that CFSTI had not justified the deductions.
- 8 The total sum the Judge ordered CFSTI to pay Ms Bizhanova was thus 747,866,75 KZT. Paragraph 1 of the Order required CFSTI to pay this within 7 days. In its submission in opposition to the application for permission to appeal, CFSTI stated that it paid the specified sum to Ms Bizhanova on 30 March 2023. Paragraph 2 of the Order states that *"in all other respects the Claim is dismissed"*. Paragraph 3 states that provided the defendant complies with paragraph 1 there shall be no order as to costs.

### **III. Part 29 of the AIFC Court Rules 2018:**

- 9 The regime governing appeals from AIFC Courts, including appeals from the SCC to the AIFC Court of First Instance ("the CFI"), is set out in Part 29 of the Court Rules.
- 10 Rule 29.10 provides that an application for permission to appeal must be filed within the period directed by the lower court or, where the lower court makes no such direction, within 21 days of the decision. In this case the lower court did not direct a time. Accordingly, time expired on 14 April 2023, almost five months before the application was filed on 11 September 2023.
- 11 Rule 29.12 provides that an application for an extension of time must give the reasons for the delay and the steps taken prior to the application being made.
- 12 Rule 29.6 provides that permission to appeal may be given where the appeal Court considers that (1) the appeal would have a real prospect of success or (2) there is some other compelling reason why the appeal should be heard. By Rule 29.7 success on an appeal depends on establishing that the decision of the lower Court was (1) wrong or (2) unjust because of a serious procedural or other irregularity in the proceedings in the lower Court.

- 13 Ms Bizhanova asked for her application to be resolved on paper, as is normal for applications for permission to appeal made to the appeal Court: see Rules 29.16 and 29.17 of the Court Rules. CFSTI has not requested an oral hearing and I am satisfied that this application can be fairly determined on the papers without such a hearing.

***The application for an extension of time:***

- 14 The application's opening words recognise that an application to extend time for seeking permission to appeal is required in this case. The reason for the delay is, however, only addressed in the last paragraph of section 2 of the claim/application form. Ms Bizhanova states: *"The good excuse is that I got sick during that period, and I was not able to submit my appeal"*.
- 15 The medical sick leave certificate issued on 12 April 2023 attached as proof (Document 9) states that the diagnosis is ICD-10 code J06.9, that is, an unspecified acute upper respiratory infection. The certificate, however, only covers the period between 12 and 14 April 2023. Moreover, there is no statement as required by Rule 29.12 about the steps Ms Bizhanova took before 12 April or after the period covered by the sick leave certificate before making her application on 11 September 2023.
- 16 Given the inclusion of the need to deal with a case expeditiously as part of the overriding objective in Rule 1.6(3) of the Court Rules, I emphasise that this Court is likely to regard non-compliance with Rule 29.12 as fatal to an application for permission to appeal. However, in this case, CFSTI's detailed submission in opposition to the application for permission to appeal does not refer to Ms Bizhanova's failure to apply within the required time limit or claim that it has been prejudiced by her delay in doing so. In those circumstances, given the context of her sickness in 2022 (see [5] above), and since for the reasons given at [23] – [27] below, I have concluded that she has raised an arguable ground within Rule 29.6(1), notwithstanding the absence of any explanation for the delay after 14 April 2023, exceptionally I extend time.

***IV. The application for permission to appeal and the opposing submission by CFSTI:***

- 17 Ms Bizhanova's submissions raise nearly all the questions she had raised before the Judge, even on points on which he had found in her favour such as that she had consented to the termination of her employment or in respect of the deductions made from her salary. She submitted that CFSTI:
- (a) has still not given her a written copy of the Contract of Employment signed by the Employer for her to sign: § 1.
  - (b) provided her with a Contract of Employment for signing in the middle of July 2022 which contained clauses providing grounds for dismissal and other conditions that had not been discussed when she was hired (unnumbered paragraph between §5 and §6).
  - (c) only gave her notice of the termination of her employment on 3 August 2022 which notice stated that it was to have effect as from 26 July 2022 by mutual agreement. She maintained that this was in violation of Regulation 60(2)(b) of the AIFC Employment Regulations No 4 of 2017 (the "Employment Regulations") which require a minimum period of 30 days' notice if the period of continuous employment is at least 3 months but less than 5 years and that she had not agreed to the termination of her employment: §§4-5, 13. As he stated at [11] of his judgment, set out at [6] above, the Judge found that she had not agreed to the termination of her employment. I note that the notice dated 3 August 2022 purported to operate with effect from an earlier date, 26 July 2022.



- (d) provided the Court with a Contract of Employment that was not signed by her and that her signature on its last page *“was likely forged”* but the SCC rejected her request to appoint a handwriting expert: §14.
- 18 The application form also referred to the deductions unlawfully made from her wages at § 6, her claim that she had not been given a written itemised pay statement contrary to Regulation 1 of the Employment Regulations at §7, and at §8 that she suffered moral harm, was left without a livelihood and experienced feelings of humiliation, discomfort and resentment.
- 19 The remedy Ms Bizhanova seeks in section 3 of the Application Form is that this Court set aside paragraph 2 of the Order dismissing all aspects of the claim save for the damages reflecting one week’s wages and payment of the sums wrongfully deducted from her wages. She asks the Court to:
- (a) recognise CFSTI’s Orders dated 21 July and 3 August 2022 as breaches of the Employment Regulations,
  - (b) oblige CFSTI to sign a contract of employment with her for one year starting from 3 May 2022,
  - (c) order CFSTI to pay her a total of 9,032,844 KZT reflecting:
    - (i) 3,032,844 KZT wages in respect of the period between 22 July and 14 October 2022,
    - (ii) 5,000,000 KZT for non-pecuniary damage, and
    - (iii) 1,000,000 in respect of her lawyer’s fee.
- 20 CFSTI’s written submission in opposition to Ms Bizhanova’s application repeats nearly all the points it had raised before the Judge, including arguments which the Judge rejected. For example, it repeats its arguments that (a) it was entitled to dismiss Ms Bizhanova without notice because she had committed a repudiatory breach, and (b) that Ms Bizhanova had orally agreed to the termination of her employment so that it was by consent. As seen in the extracts from the judgment set out earlier, the Judge rejected those arguments. CFSTI’s written submission also maintains that Ms Bizhanova did sign the contract given to her by its former legal consultant, Ruslan Polatbekov, but did not return it then, and only did so later and that its employees had no reason to believe that the contract returned was not signed by Ms Bizhanova. As stated at [6] and [7] above, the judge considered that it was not necessary for him to resolve this issue.
- 21 CFSTI has, however, neither applied for permission to appeal against those matters on which the judge rejected its case or made no decision, either in a Respondent’s Notice under Rule 29.29 of the Court Rules or in its written submission. Moreover, its submission does not advance arguments explaining why it considers that the Judge’s decisions on those matters to be wrong. Rule 29.30 provides that the requirements of Rules 29.23 -29.27 apply to an application to appeal in a Respondent’s Notice as if the respondent were the appellant. The absence of a Respondent’s Notice containing an application to appeal against the matters on which the judge rejected CFSTI’s case or made no finding and submissions supporting an appeal by it on these matters means this Court is unable to consider whether those points would have a real prospect of success or that there is some other compelling reason why an appeal on them should be heard.

#### **V. My decision:**

- 22 The crux of the Judge’s reasoning for deciding that it was not necessary to ascertain whether the signature on the written Contract of Employment was a fraud was that, whether or not it was a fraud, CFSTI was entitled to terminate the contract lawfully. He stated at [11], set out at [6] above that, in the light of the evidence before the Court there were only two plausible possibilities. The first was that CFSTI

included within the terms of the contract a three-month probation clause pursuant to Regulation 15. The second is that, if CFSTI required a probation clause, as it was entitled to do, and Ms Bizhanova did not agree to such a clause, there was no contract of employment in the first place. He stated that on both these possibilities, CFSTI was entitled to terminate the contract lawfully.

- 23 I have concluded that, as it is undisputed that Ms Bizhanova worked for over two months for CFSTI between 3 May 2022 and 7 July 2022, and that CFSTI accepted her work, there was a third plausible possibility which would have made it necessary for the Court to ascertain whether the signature on the written Contract of Employment was Ms Bizhanova's. Although the judge was correct to state at [11] that it was entirely up to the employer whether to include a clause providing for a probationary period in the contract, Ms Bizhanova's consent was necessary for it to be included in her contract. The rendering and acceptance of work by an employee may well mean that a contract between them came into existence. But, if the signature on the written Contract of Employment which Ms Bizhanova states she was given in mid-July and had not seen before then and which Mr Polatbekov states in his written explanation was only provided to Ms Bizhanova on 11 July 2022 is not hers, the contract that arose as a result of the rendering and acceptance of her work from 3 May 2022 was not on the terms including the probation clause of the written Contract of Employment. There is no finding that Ms Bizhanova knew the employer wanted to include a probation clause before 11 July. In those circumstances, absent a determination that the signature was Ms Bizhanova's which the judge did not make, it is arguable that her Ms Bizhanova's work from 3 May 2022 and CFSTI's acceptance of it gave rise to a contract between them without a probationary period specified in it as required by Regulation 15(1).
- 24 On that scenario, the 1-week notice specified in Regulation 15(2) would not apply. The matter would be governed by the minimum notice provisions in Regulation 60(2). The question is whether it is arguable in the sense that there is a real prospect of successfully arguing that the 30-day notice period in Regulation 60(2)(b) applies rather than the 7-day notice period in Regulation 60(2)(a). Ms Bizhanova maintains that it does: see [17(c)] above.
- 25 Given that CFSTI only gave notice of the termination of Ms Bizhanova's employment on 3 August 2022, albeit stating that the notice was to have effect as from 26 July, I have concluded that, for the reasons in the next two paragraphs, it is arguable that Regulation 60(2)(b) applies, and the period of notice required was 30 days and not 7 days.
- 26 First, I consider it arguable within Rule 29.6 of the Court Rules that Ms Bizhanova was in the continuous employment of CFSTI between 3 May and 3 August 2022. This is a period of exactly 3 months, which falls within Regulation 60(2)(b), rather than a period of "*less than 3 months*" which would fall within Regulation 60(2)(a). This is because Ms Bizhanova remained in CFSTI's continuous employment while she was absent from work between 7 and 25 July due to her sickness. As the judge stated at [10] of his judgment, set out at [6] above, although the entitlement to sick pay under Regulation 34 is contingent on the employee giving the employer the notice required by Regulation 33, there is nothing to indicate that the failure to give such notice disentitles the employee to sick pay or amounts to a repudiatory breach or ends the employment.
- 27 Secondly, the judge held that Ms Bizhanova she did not consent to the dismissal operating with effect from 26 July 2022. In the absence of her consent, it is clearly arguable that the notice operated from 3 August 2022, the date on which it was given. Were it possible for a party to provide that notice is to have effect from an earlier date than the one on which it was in fact given, it would be possible to circumvent the minimum notice periods specified in Regulation 60. I observe that even in cases of termination of a contract as a result of a repudiatory breach, the termination generally operates from the date the

innocent party accepts the breach as discharging the contract: see for example *Heyman v Darwins* [1942] AC 356.

- 28 For these reasons, and in circumstances where the judge considered that it was not necessary to determine whether the signature on the written contract was Ms Bizhanova's, I have concluded that there is a real prospect of success within Rule 29.6(1) in maintaining that the Judge erred in finding that Ms Bizhanova is only entitled to 7 days' notice of the termination of her contract and that she should have been given 30 days' notice. Permission to appeal limited to that question is therefore granted. Ascertaining whether the signature on the written contract was Ms Bizhanova's is likely to depend on the question that the judge considered that it was not necessary to determine. If so, the court hearing the appeal will have to consider whether the most practical way of doing so is to order the appointment of a handwriting expert, and, if it does, whether to remit consideration of the report of the expert to the SCC.
- 29 I do not consider that, at this stage, any reason within Rule 29.6 of the Court Rules has been shown in respect of the other matters raised by Ms Bizhanova. Permission to appeal on those issues is not granted but is reserved to the Court hearing the appeal pursuant to Rule 29.22(2) of the Court Rules.

By Order of the Court,

The Rt. Hon. Sir Jack Beatson FBA  
Justice, AIFC Court

Representation:

The Claimant was represented by Ms. Gulsim Kakisheva, advocate, Aktobe regional bar association, Astana, Kazakhstan.

The Defendant was represented by Mr. Tolegen Orashev, Chief Executive Officer, Center for Scientific and Technological Initiatives Ltd., Astana, Kazakhstan.

**IN THE COURT OF APPEAL  
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE**

**22 June 2023**

**CASE No: AIFC-C/CA/2023/0017**

**State Institution “Astana Education Department”**

**Appellant**

**v**

**Buldirshin-2012 LLP**

**Respondent**

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**JUDGMENT**

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**Justice of the Court:**

**Justice Sir Stephen Richards**

## ORDER

**The applications for permission to appeal and for suspension, pending an appeal, of the monetary payment ordered by the Court of First Instance are refused.**

## JUDGMENT

1. By a judgment dated 30 March 2023 in Case No. AIFC-C/CFI/2022/0003 the Court of First Instance of the Astana International Financial Centre (“the CFI”) (Justice The Rt. Hon. Sir Jack Beatson FBA) determined a claim by Buldirshin-2012 LLP (“the Private Partner”) against the City of Astana’s Education Department (“the Public Partner”) under a public-private partnership contract (“the PPP Contract”) to construct and operate a kindergarten. The Court found largely in favour of the Private Partner and ordered the Public Partner to pay the Private Partner the sum of 1,776,174,926 KZT within 28 days of the handing down of the judgment.
2. This is an application by the Public Partner for permission to appeal against the CFI’s decision and for suspension, pending an appeal, of the monetary payment ordered by the CFI.
3. Rule 29.6 of the AIFC Court Rules provides that permission to appeal may be given where the appeal Court considers that (1) the appeal would have a real prospect of success or (2) there is some other compelling reason why the appeal should be heard. By Rule 29.7 success on an appeal depends on establishing that the decision of the lower Court was (1) wrong or (2) unjust because of a serious procedural or other irregularity in the proceedings in the lower Court.
4. An application for permission to appeal made to the appeal Court will normally be determined on paper; and although an oral hearing is requested by the Public Partner, I am satisfied that the application can be fairly determined in this case on the papers without an oral hearing (see Rules 29.16 and 29.17 of the AIFC Court Rules). In addition to the Public Partner’s application and supporting documents, the papers before the Court include written submissions on behalf of the Private Partner in opposition to the application, pursuant to Rule 29.13 of the AIFC Court Rules.
5. Reference should be made to the CFI’s judgment for the background to the case and for the Court’s detailed analysis and conclusions.
6. The application for permission is a diffuse document, with a considerable amount of detail but without a clear statement of the grounds of appeal; and it adopts a narrative form without even the benefit of numbered paragraphs. The document is rightly criticised by the Private Partner for its lack of organisation and of structured argument. In this judgment I deal with various specific points and themes that I have identified in the application, but I have considered the document as a whole in reaching my decision on the application.
7. The application starts with a generalised submission that the CFI’s decision “was made without sufficient and objective consideration of all the case materials, which significantly affected the conclusions made by the court when making the decision”. It comes back to this at the end of the document, submitting that the CFI “made an incorrect decision, due to insufficient and biased

consideration of the case materials”. As explained below, those submissions are not made good by the detail sandwiched between them. They do an injustice to what is a conspicuously fair and careful judgment which sets out clearly the issues in dispute and the submissions of each party on those issues, examines at some length the written and oral evidence relevant to each issue, and reaches appropriate conclusions based on the Court’s findings of fact and legal analysis.

8. The application goes on to submit that the Court did not take into account the fact that the Private Partner signed the PPP Contract “on obviously unfavourable conditions for itself” despite having had the opportunity to review the design and estimate documentation, so that it was “his will, his decision and his share of responsibility for the execution of the contract”. But it takes the Public Partner nowhere to say that the Private Partner made an informed decision to enter into the contract. The central issues for the Court concerned the obligations of the Public Partner under the terms of that contract (notably the obligation to provide engineering infrastructure in the form of an electricity connection) and whether the Public Partner was in breach of those obligations. The Court made detailed findings against the Public Partner on those issues. The Private Partner cannot sensibly be said to have shared responsibility for the Public Partner’s breach of its obligations.
9. The next paragraph of the application states that the claim referred only to the failure to provide one of the infrastructure elements, the connection to the power supply networks, and that there was no dispute over the provision of the land plot for the construction and operation of a PPP facility; and the paragraph ends by stating that the Private Partner “accepted the land plot without comments”. It is not clear what point is sought to be made by this. An issue as to the timing of the provision of the land plot was dealt with by the CFI for sound reasons, explained in paragraph 66 of the judgment; and the Court concluded at paragraph 77 that the plot was provided to the Private Partner on 18 April 2018 (after the March 2018 date when, as was common ground, construction in fact started). Although dealing with that issue, however, the Court noted in paragraph 66 that the more important question was whether the Public Partner was in breach of its obligation to provide electrical power infrastructure, a question considered at paragraphs 91ff. of the judgment. As to the question of comments about the lack of electrical infrastructure, that is dealt with by the CFI as part of its consideration of the wider issue concerning electrical infrastructure: the conclusion summarised at paragraph 114 of the judgment, and for which there is a sufficient evidential basis, is that the Private Partner gave the Public Partner written notice of the power supply problems in June 2018 and communicated about the problems more informally with the Public Partner before then.
10. The application then devotes a lengthy passage to the electricity infrastructure issue, including the attempts by the Private Partner to solve the problem, the solution ultimately reached by Supplementary Agreements No.1 and No.2, the effects of delay and the question of responsibility for the delay. The application also returns to the issue in a later passage, after dealing with a separate topic concerning financial closure (considered below). The electricity infrastructure issue forms a major part of the CFI’s judgment, at paragraphs 91-136, where the Court deals with the facts, the rival submissions and the Court’s conclusions. In the first of its passages concerning that issue, the application for permission to appeal quotes from or summarises the content of various paragraphs of the CFI’s judgment (referring in particular to paragraphs 97-98, 105 and 109) and refers to some of the oral testimony and documentary material that was before the Court. This leads into the assertion that the Court “insufficiently analysed the available documents and facts regarding the

provision of infrastructure – electricity (temporary and permanent) and the actions of the Public and Private Partner, which ultimately influenced the determination of the guilt of the parties in the execution of the PPP contract”. When the application comes back to the issue in the later passage, reference is made to further paragraphs of the CFI’s judgment (paragraphs 110-111 and 125-130 in particular) and criticism is again directed towards the sufficiency of the Court’s analysis of the evidence, including the assertion that “some documents are subjected to a thorough analysis, and documents on the same issues of the same period are ignored”. But these submissions as to insufficiency of analysis and of failure to take into account relevant evidence are unsustainable. The CFI’s findings of fact are based on a careful analysis of the documentary and oral evidence. They were properly open to the Court on the evidence and they provide a sound basis for the conclusions reached. The application does not refer to any documents capable of undermining the Court’s findings. The pages of the application dealing with this issue amount in reality to an attempt to re-argue the matter but they do not establish a cogent case that the Court’s analysis was deficient or that its conclusions were wrong.

11. Between the two passages of the application relating to the electricity infrastructure issue is a lengthy passage on the broad subject of financial closure, starting with the contention that the CFI “has not analysed and separated the concepts of ‘Effective Date of the Contract’ and the concept of ‘Financial Closure’ accurately enough and in accordance with the contract”, and going on to make a miscellany of assertions about the Private Partner’s lack of financing for the project and its failure to fulfil its obligations under the contract. It is very difficult to see where all of this goes. As stated at paragraph 79 of the CFI’s judgment, one of the Public Partner’s arguments was that the obligation to provide the land plot only arose after financial closure, which was delayed because the Private Partner did not provide written notification that it had the right to access the financing necessary for the construction of the kindergarten. But the Court knocked out that argument at the first step, holding at paragraphs 80-82 that on the proper construction of clause 7 of the contract all necessary measures to provide the plot had to be taken within a period of 60 days from the date on which the contract came into force, rather than only after financial closure. The application does not appear to challenge that finding, which is in any event clearly correct. Although the Court went on to consider the question of written notification by the Private Party that it had the financing necessary for the project, the Court held at paragraph 88 that in view of its conclusion on the meaning of clause 7 it was not necessary to decide when written notification occurred. For the sake of completeness, however, the Court asked itself what the position would have been had it been necessary to decide the question; and in paragraph 89 it said that the evidence was not entirely clear but there was sufficient evidence to enable the Court to make one of three inferences, each one of which was adverse to the Public Party’s case on the point. In those circumstances nothing ultimately turns on the Court’s observations on this issue, and the criticisms directed by the Public Partner towards those observations are misplaced. In any event, however, the observations have a sufficient basis in the evidence and are not shown to be arguably wrong.
12. The application refers penultimately to Article 46(1-1) of the Law on Public-Private Partnerships, upon which the Public Partner placed some reliance before the CFI. The Public Partner’s submissions based on that provision were rejected by the Court for reasons given at paragraphs 131-132 of its judgment. Whilst referring to the provision, the application does not appear to challenge the CFI’s

conclusion in relation to it and does not engage with the reasons for that conclusion. If a challenge is intended, it does not get off the ground.

13. The final issue addressed in the application concerns the timing of payments of Compensation for Investment Costs (“CIC”), a question considered at paragraphs 133-135 of the CFI’s judgment. The Court held that payments of CIC had fallen due in 2018 and 2019 under the terms of the original contract (and at a time when the contractual construction period was to end in December 2018) and that the Private Partner’s entitlement to such payments had not been changed by the terms of Supplementary Agreement No.1 (which extended the contractual construction period to October 2020 but only changed the amounts of CIC for 2020 and 2021) or by Supplementary Agreement No.2 (which increased the CIC for 2021 to reflect the construction of the transformer substation). It rejected the Public Partner’s contention, based on Article 9(4) of the Law on Public-Private Partnerships, that payments were to be postponed to 2024 and 2025. The application renews the contention but does not reveal any error in the Court’s reasoning. The application relies *inter alia* on a Budget Commission decision dated 4 December 2020 approving a payment schedule that postponed the payments for 2018-2019 to 2024-2025; but it is obvious that a third party executive decision of that kind cannot affect the correct analysis under the contract between the parties.
14. I note that, according to the written submissions on behalf of the Private Partner, the version of the Law on Public-Private Partnerships in force even at the extended date for the end of the construction period, October 2020, did not contain the requirements in Article 46(1-1) and Article 9(4), which were adopted only by amendments dated 2 January 2021. If correct, that would be a further reason for dismissing the Public Partner’s reliance on those provisions. It does not, however, feature in the CFI’s judgment and was not necessary for the Court’s conclusions. I therefore place no reliance on the point for the purposes of my present decision.
15. In conclusion, for the reasons summarised above, an appeal would have no real prospect of success. There is no other compelling reason why an appeal should be heard. The application for permission to appeal is therefore refused.
16. It follows that the Public Partner’s application for suspension, pending an appeal, of the CFI’s order for payment of the sum of 1,776,174,926 KZT must also be refused.

By the Court,

The Rt Hon. Sir Stephen Richards

Justice, AIFC Court





**Representation:**

The Appellant was represented by Mr. Kasymhan Sengaziev, Head of the State Institution “Astana Education Department”.

The Respondent was represented by Mr. Almas Satylganov, Project Manager, Buldirshin-2012 LLP.



IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

26 May 2023

CASE No: AIFC-C/SCC/2023/0016

Crowe Audit Astana LLP

Claimant

v.

KAP TRADE LTD

Defendant

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ORDER

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Justice of the Court:

Justice Charles Banner KC



## **ORDER**

BY REQUEST:

1. The claim is discontinued.

By Order of the Court,

Charles Banner KC,  
Justice, AIFC Court

Representation:

The Claimant was represented by Mr. Arman Baymishev, lawyer, Crowe Outsourcing KZ, Almaty, Kazakhstan.

The Defendant was not represented.



IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

26 May 2023

CASE No: AIFC-C/SCC/2023/0015

Private Company Documentolog Limited

Claimant

v.

Hard Skills Foundation LLP

Defendant

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ORDER

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Justice of the Court:

Justice Charles Banner KC



## **ORDER**

BY REQUEST:

1. The claim is discontinued.

By Order of the Court,

Charles Banner KC,  
Justice, AIFC Court

Representation:

The Claimant was represented by Ms. Ayan Kabenova, Leading Lawyer, Private Company Documentolog Limited.

The Defendant was not represented.



IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

19 June 2023

CASE No: AIFC-C/SCC/2023/0014

AURORA GEOPHYSICS LTD

Claimant

v

METEOR MINING COMPANY KZ (CONDUIT 23) LTD

Defendant

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JUDGMENT

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Justice of the Court:

Justice Patricia Edwards



## **ORDER**

UPON the commencement of a Claim on 24 April 2023;

AND UPON the filing of a Defence on 8 May 2023;

IT IS ORDERED that:

1. The Defendant shall, by 4pm on 30 June 2023, pay the Claimant:
  - (1) KZT 14,093,888 indexed as of the date of payment as provided in clause 2.1 of the Agreement dated 1 September 2021;
  - (2) KZT 5,877,760 indexed as of the date of payment as provided in clause 2.1 of the Agreement dated 22 October 2021; and
  - (3) KZT 1,997,165.

## **JUDGMENT**

1. The Claimant and the Defendant entered into two Geophysical Survey Agreements, dated 1 September 2021 and 22 October 2021 ("the Agreements"). In the first Agreement, the Claimant agreed to carry out a geophysical survey in return for a total sum of 14,093,888 tenge. In the second Agreement, the Claimant agreed to carry out a geophysical survey of a second site, in return for a total sum of 5,877,760 tenge.

### **Jurisdiction**

2. Clause 11.4 of each Agreement provides that:

*"11.4 All disputes and disagreements that may arise between the Parties will be resolved through negotiations. Unresolved disputes are resolved in the Specialized Interdistrict Economic Court of Nur-Sultan in the manner prescribed by the legislation of the Republic of Kazakhstan."*

*11.6 The applicable law under the Agreement is the law of the Republic of Kazakhstan. In everything that is not regulated by the Agreement, the Parties are guided by the legislation of the Republic of Kazakhstan.”*

3. However, both parties are members of the AIFC and in the claim and defence both agree that the dispute should be resolved by the AIFC Court. Pursuant to Article 13.4 of the Constitutional Statute of the Republic of Kazakhstan on the Astana International Financial Centre, Constitutional Statute No. 438-V ZRK of 7 December 2015 (as amended), the AIFC Court has exclusive jurisdiction in relation to *“disputes transferred to the AIFC Court by agreement of the parties”*. This court therefore has jurisdiction over this claim.
4. The Claimant claims 19,971,648 tenge plus penalties amounting to 1,997,165 tenge. The total sums claimed are equivalent to approximately US\$49,000. As this is less than US\$150,000, it is appropriate that the claim be determined in the Small Claims Court pursuant to Rule 28.1(1) of the AIFC Court Rules.

#### **Payment terms**

5. Clause 1.2 of each Agreement provided that:

*“1.2 The works are considered completed after the signing of the Certificate of Completion of the Works by the authorized representatives of the Parties.”*

6. On 14 April 2022, certificates of performance of the surveys were signed by the parties under both Agreements.

7. Pursuant to clause 3 of each agreement:

*“3.1.1 The Client makes an advance payment to the Contractor in the amount of 40% of the Total amount of the Agreement. Payment of the advance payment is made no later than 5 (five) business days from the date of the signing of the Agreement.*

*3.1.2 Subsequent payments are made monthly upon completion of field and processing works, no later than 5 (five) working days from the date of signing by the parties of the Certificate of Completion.”*



8. Accordingly, the first 40% under each Agreement was due by 8 September and 29 October 2021 respectively. The remaining sums fell due by 21 April 2022 under both Agreements, being five working days from signing of the certificates of completion.
9. On 16 June 2022, the Claimant sent the Defendant a pre-trial claim, saying that the services had been performed and accepted in full, and asking for payment of the sums due under the Agreements by 26 June 2022.
10. Various discussions appear to have followed about potential investors being sought by the Defendant, and timings for making payments. No resolution was reached, and this claim was commenced on 24 April 2023.
11. On 8 May 2023, the Defendant filed its Defence. The document refers to various challenges faced by the Defendant, including due to Covid-19 and difficulties in securing investors. However, no substantive defence to the claim has been raised.
12. It follows, therefore, that the Defendant is liable to pay the cost of works claimed under the Agreements. The total sum due in this respect is KZT 19,971,648.
13. It should be noted that this sum may fall to be adjusted in line with changes in exchange rates. Clause 2.1 of the first Agreement provides:

*“The total cost of the Works to be performed by the Contractor under the Agreement is 14 093 888 ... tenge ... on the basis that 1 US dollar is equal to 425.74 at the rate of the National Bank of the Republic of Kazakhstan as of 31.08.2021. If the US dollar exchange rate set by the National Bank of the Republic of Kazakhstan changes, the cost of the services provided by the Contractor will be indexed as of the date of the Client pays for the Contractor’s services.”*

14. Clause 2.1 of the second Agreement is in materially identical terms, save that the passage underlined above is replaced with the following: *“on the basis that 1 US dollar is equal to 425.71 at the rate of the National Bank of the Republic of Kazakhstan as of 22.10.2021”*.
15. Accordingly, the cost of works under each Agreement should be adjusted pursuant to these clauses at the date of payment.

**Penalty**

16. In addition, the Defendant is liable to pay an additional sum for late payment under each Agreement. Clause 6.3 of each Agreement provides:

*“6.3 For violation by the Client of the terms of payments stipulated by the terms of the Agreement, the Client shall pay to the Contractor, at his request, a penalty in the amount of 0.1 (one tenth)% of the Total amount of the Agreement for each day of delay, but not more than 10 (ten)% of the Total amount of the Agreement.”*

17. The delay in payment under each Agreement has been more than 100 days, and accordingly the maximum penalty of 10% has been reached. The total penalty due under both Agreements is therefore KZT 1,997,165.

By the AIFC Court,

Patricia Edwards,  
Justice, AIFC Court

**Representation:**

The Claimant was represented by Omarov Nariman Maidanovich, legal counsel, Aurora Geophysics LTD, Astana, Kazakhstan.

The Defendant was not represented.

**IN THE COURT OF APPEAL  
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE**

**5 May 2023**

**CASE No: AIFC-C/CA/2023/0013**

**Joint Stock Company “Center for Ground-based Space Infrastructure”**

**Appellant/Defendant**

**v**

**Joint Stock Company Kazakh-Russian Joint Venture “Baiterek”**

**Respondent/Claimant**

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**JUDGMENT**

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**Justice of the Court:**

**Justice Sir Stephen Richards**

## **ORDER**

**(1) The required extension of time is granted.**

**(2) Permission to appeal is granted.**

## **JUDGMENT**

1. By a judgment and order dated 8 November 2022 in Case No. AIFC-C/CFI/2022/0015 the Court of First Instance (“the CFI”) of the Astana International Financial Centre gave judgment in favour of the Claimant against the Defendant in the sum of 13,684,550,338.70 tenge. The claim related to default by the Defendant in providing an environmental impact assessment under a contract between the parties. The Court stated that the Defendant had not provided any substantial reasons as to why the sum should not be paid. The only objection made to the claim was an argument on jurisdiction which the Court readily dismissed.
2. By an appellant’s notice issued on 29 March 2023, far outside the time limit laid down by Rule 29.10 of the AIFC Court Rules, the Defendant has applied for an extension of time and for permission to appeal against the CFI’s judgment. The grounds of appeal rely on arguments that were not raised before the CFI.
3. At first sight such an application looks unpromising. Behind the application, however, lie factual circumstances that make this an unusual case. In summary, the Defendant explains that an analysis initiated immediately following the CFI’s judgment found that the company did not have the assets needed to meet the judgment. Execution of the judgment would result in paralysis of its business and inevitable bankruptcy, with serious social and economic implications for a company with over 10,000 employees. Measures to enforce the judgment have resulted already in prohibitions on the removal and disposal of the company’s property, threatening among other things the completion of work aimed at the development of the Baiterek space rocket complex to the benefit of the Claimant. All this has led to further discussions between the parties and to the identification of a basis upon which the size of the financial award might be challenged, namely that the sum awarded is a penalty disproportionate to the loss incurred by the Claimant through the Defendant’s default: reliance is placed on article 333 of the Civil Code of the Russian Federation, the substantive law of which governs the contract, and on article 297 of the Civil Code of the Republic of Kazakhstan.
4. The Defendant states that in the course of the parties’ attempts to achieve an out-of-court settlement, the AIFC Court’s Registry advised that approval could not be given to a settlement directly modifying the CFI’s judgment and the procedure for its enforcement. That led to consideration of an appeal, though the deadline for an appeal had been missed. The parties signed a memorandum dated 24 March 2023 on co-operation for settling disputes in connection with the performance of the contract. Under that memorandum the Claimant agreed not to oppose the applications for an extension of time and permission to appeal. In written observations pursuant to

Rule 29.13 of the AIFC Court Rules the Claimant has confirmed the memorandum as regards the procedural position but reserves to any substantive appeal its submissions on the merits.

5. In the unusual circumstances described above, I take the view that the Court should not stand in the way of further discussions between the parties with a view to settlement of the dispute. An effective settlement is possible in principle within the framework of an appeal, though the decision whether to modify the CFI's judgment is ultimately a matter for the appeal Court. Accordingly:
  - (1) I grant an extension of time, despite the length of the extension required. I take into account the stated reasons for the delay and the fact that the respondent does not oppose the application (though it is to be noted that by Rule 29.11 of the AIFC Court Rules the parties cannot by themselves agree to extend the time for appeal – the decision is for the Court).
  - (2) I also grant permission to appeal. I do so not on the basis that an appeal would have a real prospect of success – it is difficult to form a judgment on that issue on the limited material at present before the Court, and the prospect of success is also adversely affected by the failure to raise the arguments before the CFI – but on the basis that there is in the circumstances described some other compelling reason why an appeal should be heard (see Rule 29.6 of the AIFC Court Rules).
6. It is to be hoped that the parties are able now to reach a settlement of the dispute; but in the absence of a settlement the appeal will proceed to a full hearing in accordance with the procedure laid down in Part 29 of the AIFC Court Rules.

By the Court,

**Representation:**

The Appellant/Defendant was represented by Mr Maxim Dragunikhin, Executive Director of the Joint Stock Company Center for Ground-based Space Infrastructure.

The Respondent/Claimant was represented by Mr Alexandr Tsoy, Executive Director of JSC Kazakh-Russian Joint Venture "Baiterek".



IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

26 May 2023

CASE No: AIFC-C/SCC/2023/0012

(1) Kusayev Serik Samigatovich

(2) Rakhat Bolatuly Bolatov

Claimants

v.

GEOPS Exploration Kazakhstan Limited

Defendant

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ORDER

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Justice of the Court:

Justice Charles Banner KC



## **ORDER**

BY REQUEST:

1. The claim is discontinued.

By Order of the Court,

Charles Banner KC,  
Justice, AIFC Court

Representation:

The Claimant was represented by Ms. Yuliya Davydova, independent external lawyer, Astana, Kazakhstan.

The Defendant was not represented.



IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

5 July 2023

CASE No: AIFC-C/CFI/2023/0011

Goldbridge International Company LLP

Claimant

v

Shanghai Construction Group Co., Ltd Kazakhstan Branch

Defendant

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JUDGMENT

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Justice of the Court:

The Rt. Hon. The Lord Faulks KC





## **ORDER**

BY REQUEST:

1. The claim is discontinued.

By Order of the Court,

The Rt. Hon. The Lord Faulks KC,  
Justice, AIFC Court

Representation:

The Claimant was represented by Ms. Lina Taiken, Director of companies of Goldbridge International Company LLP, Atyrau, Republic of Kazakhstan.

The Defendant was represented by Mr. Yuriy Kamaletdinov, advocate, Astana Advocates' Bar Association, Astana, Republic of Kazakhstan.



IN THE SMALL CLAIMS COURT  
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

23 October 2023  
Hearing date: 3 October 2023  
CASE No: AIFC-C/SCC/2023/0010

DOCUMENTOLOG GLOBAL LIMITED PRIVATE COMPANY

v

Claimant

AUTOMATION TECHNOLOGY AND SOLUTIONS LLP

Defendant

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JUDGMENT AND ORDER

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Justice of the Court:  
Justice Tom Montagu-Smith KC

## ORDER

1. **The Defendant shall by 18:00 Astana time on Monday 6 November 2023 pay the Claimant the sum of KZT 4,667,022.77.**

## JUDGMENT

1. This is a claim for a debt made under a contract entered into by the parties on 8<sup>th</sup> June 2021 (*“the Contract”*). Under the terms of the Contract, the Claimant provided the Defendant with access to an electronic document management and business process automation system. The Defendant subsequently made those services available to its client, Tengizchevroil LLP. The Claimant’s case is that the Defendant failed to pay for the second year of service, as a result of which the Claimant suspended the services. The Claimant claims for the part of the fee attributable to the period for which the system was available to the Defendant and its client.
2. I ordered that any party wishing to rely on witness evidence should file and serve witness statements by 28 July 2023. Neither party produced any witness statements. At the hearing, the Defendant asked to be allowed to produce evidence from one of its directors, Mr Erzhan Nurtazin. Despite the lateness of this, the Claimant did not object, so I indicated to counsel that the Defendant could call its witness. At that point, the witness left the hearing and did not return. The Defendant’s counsel indicated that we should proceed without him. As a result, I have been invited to decide this case on the basis of the documents and submissions.
3. The Contract was subject to certain terms of service – the Terms of Service of Documentolog Electronic Document Management and Business Process Automation Information System (*“the Terms of Service”*) and was to run for 2 years from 25 May 2021.
4. By clause 3.1 of the Terms of Service, the Defendant was obliged to pay in advance for each year of the contract. By clause 4.1.2, the total sum due in respect of each calendar year was KZT 26,867,011.
5. Clause 4.8 of the Terms of Service provided:  
*“In the event that the [Defendant] does not pay for the System Service within the period specified in this Agreement... the System Service becomes unavailable to the [Defendant] until he fully repays the debt for the System Service.”*
6. The Defendant paid for the first year in advance. The Claimant issued an invoice to the Defendant for the second year requiring payment by 15 July 2022. The Defendant failed to pay. As a result, on 31 July 2022, the Claimant suspended the service. The Claimant says that the parties agreed to recalculate the sum due for the system service so that the Defendant would pay only for the period used. Ultimately, the Defendant did not pay despite, the Claimant says, the Defendant receiving payment from Tengizchevroil LLP.
7. In its original defence, the Defendant disputed the jurisdiction. I rejected that application. On the merits, the Defendant said that it did not *“recognise the claim in full”* and intended to file counterclaims and call witnesses to give evidence.

8. In a further document filed on 10 July 2023, the Defendant asserted that the Claimant had concluded a contract directly with Tengizchevroil LLP. It asserted that the termination of the Contract was unilateral and not accepted by the Defendant.
9. In response, the Claimant said:
  - a. The Contract was terminated because the Defendant failed to comply with conditions of the Contract to:
    - i. Employ suitably qualified personnel; and
    - ii. Include provisions in its contracts with its end users protecting the Claimant's copyright in the system; and
  - b. The Claimant's contract with Tengizchevroil LLP was concluded on 15 December 2022, more than 4 months after service was suspended.
10. I do not need to make any findings on these issues for the purposes of this claim.
11. The Defendant accepts that it signed the Contract. It accepts that it did not pay for the second year of service but that its customer had access to the system between 26 May 2023 and 31 July 2023.
12. As a result of non-payment, the Claimant was entitled to suspend service – this was expressly provided for in the Contract and the Defendant can have no complaints.
13. The Claimant claims only for that part of the fee attributable to the period in which the Defendant used the service. It might have been entitled to claim the whole of the annual fee. This reduced claim might be the result of the agreement it says it reached with the Defendant. It might be that it has managed to recoup its loss, in part, by supplying services directly to Tengizchevroil LLP. Whatever the reason, it appears that at least the sum claimed was due.
14. When asked whether the Defendant accepted that something was due for the period of use, the Defendant's counsel said that there needed to be a reconciliation. He said that insufficient documentary evidence had been produced to support the sum claimed.
15. I reject that submission. The fee was calculated simply by apportioning the annual fee over the period of use.
16. The Defendant also suggested that there was some difficulty because the Claimant had "*parallel*" contracts with the end user, Tengizchevroil LLP. It did not. It terminated the Contract and then entered into a fresh contract with Tengizchevroil LLP. In any event, the debt from the Defendant to the Claimant had already arisen and could not be extinguished by the Claimant's subsequent contract with the end user.
17. The Defendant suggested that the Claimant should look to Tengizchevroil LLP to pay for the service. However, the Claimant's contract in the relevant period was with the Defendant. The debt was the Defendant's. The Claimant has also been told by Tengizchevroil LLP that it paid the Defendant for the service. Whether or not that is the case, it does not alter the debt which had been incurred by the Defendant to the Claimant.

18. The Claimant also claims the sum of KZT 222,239.18 for late payment. By clause 6.5.5, the Defendant was liable to pay a penalty of 0.1% for each calendar day of delay in payment, up to a maximum of 5%. Payment is more than 50 days late. As a result the full 5% penalty has accrued.

19. In the circumstances, the Defendant is liable to pay the Claimant a total of KZT4,667,022.77, being:

- a. KZT 4,444,783.59 in respect of fees for the service; and
- b. KZT 222,239.18 as a penalty for late payment.

By Order of the Court,

Justice Tom Montagu-Smith KC,  
Justice, AIFC Court

Representation:

The Claimant was represented by Ms. Ayan Kabenova, Documentolog Global Limited Private Company, Astana, Republic of Kazakhstan.

The Defendant was represented by Mr. Denis Mishin, Lawyer, Akmola Region Bar Association, Astana, Republic of Kazakhstan.



**IN THE SMALL CLAIMS COURT**

**OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE**

**26 May 2023**

**CASE No: AIFC-C/SCC/2023/0009**

**Aidana Aituarova**

**Claimant**

**v**

**Private Company Smart Parking Technologies LTD**

**Defendant**

**JUDGMENT**

**Justice of the Court:**

**Justice Charles Banner KC**

### ORDER

1. The claim is allowed to the limited extent that the Defendant shall pay damages to the Claimant in the sum of 276,164.38 KZT in compensation for the three-day truncation of her statutory notice period under Regulation 60 of the AIFC Employment Regulations.
2. In all other respects the claim is dismissed.
3. The Claimant's application for an award of costs is refused.

### JUDGMENT

#### Introduction

1. By this claim, the Claimant, Aidana Aituarova, seeks various remedies against the Defendant Private Company Smart Parking Companies Ltd, in relation to what she contends was her unlawful dismissal as an Executive Director of the Defendant by notice dated 5<sup>th</sup> October 2022.
2. The Court has had the benefit of written pleadings and evidence from each party, which were elaborated orally at a video hearing held on 4<sup>th</sup> May 2023. The Court is grateful to counsel for both parties for the high quality of their submissions.
3. At the hearing, counsel for the Claimant called oral evidence from Mr Bakhtiyar Rakhmatullayev, a former employee of the Defendant. Counsel for the Defendant called evidence from Mr Amirkhan Omarov, Chief Executive Officer of the Defendant, from whom a signed 'affidavit'<sup>1</sup> dated 6<sup>th</sup> March 2023 had previously been submitted.
4. The Court is satisfied that both witnesses were credible and sought to give accurate evidence. A significant limiting factor in relation to Mr Rakhmatullayev's evidence, however, is that it was from the perspective of his own experience of employment with the Defendant which was itself terminated. The Claimant herself, who could have given first hand evidence about her own employment and the oral discussions about its terms which she claims she had with Mr Omarov, did not give evidence at the hearing. The Court's role in this case is to determine the disputed issues about the terms and termination of the Claimant's employment contract, not to make findings about the terms and termination of Mr Rakhmatullayev's employment contract.
5. The evidence of both witnesses was given informally pursuant to Rule 28.29 of the AIFC Court Rules ("**ACR**"). The Court refused previously unforeshadowed requests at the hearing by each counsel to cross-examine their opposing witnesses. It will only be in comparatively rare cases that cross-examination will be necessary in order to give effect to the Overriding Objective in Part 1 of the ACR. This was not one such case. Each party was able to comment on the evidence given by the other party's witness, and in the circumstances of this case (including those referred to in paragraph 4 above) that was more than sufficient to ensure a fair hearing.
6. Counsel for both parties confirmed their agreement at the hearing that the Claimant's contract of employment with the Defendant was governed by the AIFC Employment Regulations as

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<sup>1</sup> I use inverted commas as the document does not appear to have been sworn, although nothing turns on that.

amended. Although reference was made in the Claim Form to the Labor Code of the Republic of Kazakhstan, counsel for the Claimant accepted at the hearing that the claim stands or falls by reference to the AIFC Employment Regulations.

### **The issues**

7. It became clear at the hearing that, whilst the parties' pleadings raised a range of points, the issues of dispute which require resolution by the Court boil down to the following:
  - (1) Was the Defendant's termination of the Claimant's employment contract in accordance with the AIFC Employment Regulations, and if not what damages are applicable? (At the hearing, the Claimant through her counsel disavowed her former claim for reinstatement).
  - (2) Is the Claimant entitled to 3% of the shares in the Defendant based upon what she says are promises made to her by Mr Omarov?
  - (3) Is the Claimant entitled to a per diem allowance in relation to her business trip to San Francisco, USA, on behalf of the Defendant in July-August 2022?

### **The Court's findings**

*Issue 1: Was the Defendant's termination of the Claimant's employment contract in accordance with the AIFC Employment Regulations, and if not what damages are applicable?*

8. The Claimant's first submission was that the reason given by the Defendant for the termination of her employment, namely a reduction in the number of staff, was not the actual reason for her dismissal.
9. Under Regulation 60 of the AIFC Employment Regulations, however, the Defendant was entitled to terminate the Claimant's employment without cause, subject to giving her the 30 days' notice period provided for by Regulation 60(2)(b). The Defendant therefore did not need to have any particular reason to dismiss her. As the Claimant has abandoned her claim for reinstatement and is seeking only damages, any failure to provide her with the requisite notice period can be compensated by an award of damages equating to her daily contractual pay multiplied by the number of days' notice denied to her.
10. The Defendant submitted that it could have terminated her contract without notice pursuant to Regulation 61(2)(d) – not on the basis of the reason that it gave her at the time (which does not fall within the list of grounds for termination without cause under Regulation 61(2)), but on the basis that, so it alleged, she had failed to comply with her duties under her employment contract. The Court rejects this submission. It is not open to the Defendant to rely after the event on a reason for dismissal which substantially differs from what was said to the Claimant at the time. Otherwise, the statutory requirement under Regulation 62 for a statement of reasons for dismissal would be rendered meaningless.
11. The Court concludes that:
  - a. Whether the stated reason was the actual reason for dismissal is immaterial to the Claimant's claim for damages, because under Regulation 60 the Defendant did not



need to have any reason for dismissing her provided that it gave her the statutory notice period, and any deficiency in the notice period can be compensated in damages; and

- b. The Defendant's after the event attempt to rely on a ground for dismissal without notice under Regulation 61 fails.
12. The next submission made by the Claimant under this heading is that she was not given the full 30 days' notice period. She submits that this period ran from 6<sup>th</sup> October 2022, the day after the notice of termination on 5<sup>th</sup> October 2022, and excluded public holidays on 5<sup>th</sup> and 6<sup>th</sup> November,<sup>2</sup> meaning that the period terminated on 7<sup>th</sup> November 2022 and not 4<sup>th</sup> November 2022 which was the final day of the notice period provided by the Defendant. The Defendant did not dispute that this was the applicable notice period in the event that (as the Court has found) Regulation 60, as opposed to Regulation 61, applies.
13. There was therefore a shortfall of 3 days from the statutory notice period. The Court will award the Claimant damages in the sum of 3 days' pay under her employment contract, in compensation for this shortfall. That amounts to 276,164.38 KZT, based upon the annual salary of 33,600,000 KZT of the 5<sup>th</sup> January 2022 employment contract as re-amended on 1<sup>st</sup> July 2022.
14. The Claimant's third and final submission under this heading is that the termination was expressed to relate only to her initial employment contract dated 1<sup>st</sup> November 2020 and not her subsequent employment contract dated 5<sup>th</sup> January 2022. The Court rejects that submission. It is clear that the 5<sup>th</sup> January 2022 contract was intended to govern the employment relationship from that date. There is no basis for concluding that, from that date, there were two free-standing employment relationships between the parties under two separate contracts.
15. It is also plain that the Defendant intended to, and did, terminate the Claimant's employment altogether. In any case, this aspect of the Claimant's case goes nowhere given her confirmation through counsel at the hearing that she no longer pursues her claim for reinstatement.

*Issue 2: Is the Claimant entitled to 3% of the shares in the Defendant based upon what she says are promises made to her by Mr Omarov?*

16. The Claimant contends that when she moved to the Defendant, Mr Omarov through her promised to transfer her 3% of the shares in the company.
17. The Claimant accepts that there was no written agreement. She contends that there was a verbal agreement to this effect.
18. This is denied by the Defendant. Mr Omarov gave clear and credible evidence, both in writing and orally at the hearing, to the effect that no such promise was made.

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<sup>2</sup> In this respect, at the hearing the Claimant's Counsel relied upon Regulation 28(1) which requires that "if an Employee's employment is terminated, the Employer must pay the Employee an amount in lieu of vacation leave accrued but not taken". The Claimant's reliance on this provision in relation to 5<sup>th</sup> and 6<sup>th</sup> November 2022 was not contested by the Defendant's counsel.

19. The Court did not have the benefit of evidence directly from the Claimant herself, either in writing or at the hearing. No explanation was provided for this. Nor was any convincing explanation given for why she did not make a contemporaneous written record of the claimed promise of equity. If, according to the Claimant's counsel at the hearing, *"the option for equity was her number one reason to move to the company"*, it would be surprising that she did not seek written confirmation or at least take her own contemporaneous written note. The Court acknowledges that the Claimant is not a lawyer, but she is on her own case a sophisticated professional, and as such she can be expected to have appreciated the importance of having a written record of what was on her case such a significant part of her employment package.
20. As noted above, Mr Rakhmatullayev's oral evidence was directed at his own situation rather than the Claimant's situation. In any case, taking his evidence at face value, the Court does not accept that it is indicative of any contractual obligations being entered into. His evidence was that, when he joined the company, Mr Omarov said to him that there would be options or bonuses *"depending on the growth of the company"* which *"will be discussed later"*; and that he was told by the Defendant *"start right now and we will come back to the question of bonuses"*. On that basis, it would appear that the prospect of a future arrangement for equity and/or bonuses was held out, but there was no formal commitment giving rise to any contractual or other legal obligations.
21. For these reasons, the Court finds that the Claimant has not discharged the burden of proof on this issue. This part of the claim is therefore rejected.

**Issue 3: Is the Claimant entitled to a per diem allowance in relation to her business trip to San Francisco, USA, on behalf of the Defendant in July-August 2022?**

22. The Claimant's counsel accepted at the hearing that there is no basis in the Claimant's written contract of employment or in the AIFC Employment Regulations for this part of the claim. There was, instead, a *"verbal agreement"* between the parties that she would be paid a per diem allowance. In this respect too, however, the claim faces the difficulty that the Claimant herself did not give evidence, whereas the Defendant through Mr Omarov gave clear and credible evidence at the hearing that there was no such verbal agreement, and that in fact the Claimant's expenses whilst on the business trip to San Francisco were charged to the company credit card, and her overnight accommodation was an apartment rented by Mr Omarov.
23. The Court finds that the Claimant has not discharged the burden of proof on this issue.

**The parallel proceedings in the Bostandyk District Court**

24. The Court was informed by the Defendant at the hearing that, on 11<sup>th</sup> April 2023, the Bostandyk District Court dismissed a claim by the Claimant for unlawful termination of a separate employment contract that she had with the Defendant's sister company, Smart Parking Technologies LLP. That contract was governed by the law of the Republic of Kazakhstan and not by the AIFC Employment Regulations. Counsel for the Defendant accepted that the Bostandyk District Court's ruling was not binding on this Court in the present proceedings, but submitted that its findings insofar as they related to similar points at issue in the present case were relevant considerations for this Court to take into account. Counsel for the Claimant accepted this, albeit he indicated that the Claimant intended to appeal. Counsel for the Defendant

submitted that such an appeal would be out of time. That is not, however, a matter for this Court to decide.

25. Ultimately, for the reasons outlined earlier in this judgment, the Court has been able to determine the disputed issues in this claim based upon the evidence presented by the parties. The findings of this judgment are consistent with the ruling of the Bostandyk District Court in relation to the claim under the LLP employment contract, but the Court has not found it necessary to rely on the Bostandyk District Court's judgment. It is therefore preferable to leave open the question of the approach that the AIFC Court should take to a judgment of the Courts of the Republic of Kazakhstan in a dispute between the same or related parties in a similar or related matter. This question would be better decided in a case in which it would make a difference to the outcome, and with the benefit of full written and oral submissions on what is on any view a point of significant general importance. Accordingly, whilst the agreement of counsel for the parties as to the correct approach is noted at paragraph 24 above, the Court expresses no view either way on this occasion.

### **Conclusions**

26. The claim is allowed to the limited extent that the Defendant shall pay damages to the Claimant in the sum of 276,164.38 KZT in compensation for the three-day truncation of her statutory notice period under Regulation 60 of the AIFC Employment Regulations.
27. In all other respects the claim is dismissed.
28. The Claim Form also seeks an order for costs against the Defendant. The overwhelming majority of the claim has, however failed. Further, there is no basis for concluding that the Defendant has acted unreasonably, so as to justify an award of costs pursuant to ACR Rule 26.9. The application for costs therefore fails.

By the Court

Charles Banner KC,  
Justice, AIFC Court

Representation:

The Claimant was represented by:

1. Mr. Aibek Kabyshev, Associate at Akhmetova Law Firm Limited, Astana, Kazakhstan.

The Defendant was represented by:

1. Mr. Abilkhair Mergaliyev, Associate at Tukulov & Kassilgov Litigation, Astana, Kazakhstan.



IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

17 May 2023

CASE No: AIFC-C/CFI/2023/0006

KAZAKHSTAN BRANCH OF JSC WITH LIMITED LIABILITY "SINOHYDRO CORPORATION LIMITED"

Claimant

v

JSC "NATIONAL COMPANY KAZAVTOZHOL"

Defendant

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JUDGMENT

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Chief Justice of the Court:

The Rt. Hon. The Lord Mance



## ORDER

1. **The Defendant shall pay the sum of 2,203,244,303.13 KZT into the escrow account within 14 days of this Order.**

## JUDGMENT

1. In this case, the Court is concerned with a construction contract made between the Parties, with the Defendant being the "Employer" and the Claimant being the "Contractor". It was made a considerable time ago and there was, no doubt, during the period of COVID-19 some difficulty in its performance; and a dispute arose, whether for that or other reasons.
2. In the course of that dispute, eventually, the Parties, and this is common ground, reached a Supplementary Agreement No. 3, whereby it was agreed to submit to the jurisdiction of this Court. That apparently replaced clauses which are not, apparently, now available -, in particular, original clauses 19 and 20, the latter dealing with dispute resolution. Those original clauses have been replaced, as I said, by an agreement to submit to the AIFC Court.
3. The second provision of that Agreement was that the Employer would temporarily make a payment in a large amount of 2,827,132,994.2 KZT to a special escrow account and would extend the Contract period to 380 days from the date of signing of this Supplementary Agreement No. 3.
4. The Agreement further provided that the Employer could bring before the Court the substantive issue of its disagreement with the decision of the Dispute Avoidance and Adjudication Board (hereinafter – "DAAB") and the Engineer's decision which had found that the Defendant should have granted an extension and that it should have made the temporary payment in the amount mentioned.
5. The scheme was that there would be an immediate temporary payment, what one would call a provisional payment, but that the Employer would not lose the Employer's right to investigate the substance of the decisions reached by the DAAB and by the Engineer but could challenge them in this Court. And, if the Employer were successful in this challenge, Supplementary Agreement No. 3 went on to say that the Claimant undertook to reimburse the amount of compensation in full within 84 days after the official Court judgment was made.
6. This Agreement has been agreed and signed by both Parties and there is no reason why it should not be binding. The position, as it happens, is that some payments were made pursuant to the obligation to make provisional payment, but by no means the full amount. The actual amount outstanding, instead of 2,827,132,994.2 KZT, is 2,203,244,303.13 KZT. That is not, as I understand, being challenged as the figure due, and certainly no contrary evidence has been put forward.

7. Having served a claim seeking an Order from the Court for the payment of the balance of the provisional sum into the escrow account, the only reaction from the Defendant has been a very recent document dated 15 May 2023, simply reciting the facts and asking the Court to refuse the claim. It does not give any reason why a temporary payment should not be made as agreed, leaving the substantive dispute to be resolved by this Court later.
8. The formal position is that the Defendant has not acknowledged service and has not put any defence or any counterclaim. This is a situation where the Claimant is entitled to a default judgment. But for the reason that I have explained, even if the Defendant had acknowledged service and had put in as a defence the document dated 15 May 2023 to which I have referred, that still would not have provided any answer to the claim because the whole commercial purpose of Supplementary Agreement No. 3 was, as I see it, that there should be a sum in the escrow account to await the judgment of this Court at some later stage on the merits, if the Defendant wished to argue that some other sum was in fact due and that the DAAB and the Engineer were wrong in what they recommended. So, even if there had been an acknowledgment of service and defence, that would not have assisted the Defendant as I see it.
9. In those circumstances, I will direct that the Court enters judgment against the Defendant for the figure of 2,203,244,303.13 KZT. That would of course leave the Defendant free under Supplementary Agreement No. 3 to bring any challenge or claim which it wishes in any way it can.
10. I am not today concerned with the merits of any such challenge or claim. They are a quite different matter from the matter before me today, which is a simple question whether a temporary or provisional payment should be made into the escrow account. I hold that the Defendant should make such a payment in the sum mentioned and the judgment should be given accordingly and there should be liberty to apply for the Claimant for further relief if necessary.
11. The question whether there should be any order for costs in respect of the proceedings today or to date will be stood over to be decided by the Court, probably on paper, in the light of written submissions to be made by the parties. The Claimant shall make and file their submissions within two working days, and the Defendant shall respond within four working days thereafter.

By Order of the Court,

The Rt. Hon. The Lord Mance,  
Chief Justice, AIFC Court



**Representation:**

The Claimant was represented by Ms. Irina Lee, Director of “Legal Company Assessor” LLP, Almaty, Kazakhstan.

The Defendant was represented by Mr. Kairatbek Nurshayev, Senior Manager of External Loans Department of JSC “National Company KazAvtoZhol”, Astana, Kazakhstan.



IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

31 October 2023

CASE No: AIFC-C/CFI/2023/0005

CASE No: AIFC-C/CFI/2023/0007

NATIONAL COMPANY "QAZAVTOJOL" JSC

Claimant

v.

"TODINI & SMS" JOINT VENTURE

Defendant

AND

"TODINI & SMS" JOINT VENTURE

Claimant

v.

NATIONAL COMPANY "QAZAVTOJOL" JSC

Defendant

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COSTS JUDGMENT

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Chief Justice of the Court  
The Rt. Hon. The Lord Mance



**ORDER**

By consent of both Parties it is hereby ordered that there shall be no Order as to costs.

By Order of the Court,

The Rt. Hon. The Lord Mance  
Chief Justice, AIFC Court

**Representation:**

**CASE No: AIFC-C/CFI/2023/0005**

The Claimant was represented by Ms. Aigerim Zeinesheva, Chief Manager of the Department of Legal and Human Resources of National Company “QazAvtoJol” JSC, Astana, Kazakhstan.

The Defendant was represented by Mr. Valikhan Shaikenov, Principal, Juris Consultus, Shaikenov Law Experts (SHEL), Almaty, Kazakhstan.

**CASE No: AIFC-C/CFI/2023/0007**

The Claimant was represented by Mr. Valikhan Shaikenov, Principal, Juris Consultus, Shaikenov Law Experts (SHEL), Almaty, Kazakhstan.

The Defendant was represented by Ms. Aigerim Zeinesheva, Chief Manager of the Department of Legal and Human Resources of National Company “QazAvtoJol” JSC, Astana, Kazakhstan.



IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

13 October 2023

CASE No: AIFC-C/CFI/2023/0005

CASE No: AIFC-C/CFI/2023/0007

NATIONAL COMPANY "QAZAVTOJOL" JSC

Claimant

v.

"TODINI & SMS" JOINT VENTURE

Defendant

AND

"TODINI & SMS" JOINT VENTURE

Claimant

v.

NATIONAL COMPANY "QAZAVTOJOL" JSC

Defendant

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JUDGMENT

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Chief Justice of the Court  
The Rt. Hon. The Lord Mance

## JUDGMENT

### *Introduction*

1. The two cases, Nos 5 and 7 of 2023, arise from the same subject-matter and are effectively mirror images of each other. Their procedural history appears from the Court's Directions dated 26 May 2023 and Order 12 July 2023. The Court thereby determined that the two cases be heard together. By its Order the Court also directed that a date be fixed for an oral hearing to decide what the Court identified as the core issue: whether a Dispute Adjudication (or "Resolution") Board ("DAB") decision dated 21 October 2022 was final. The date fixed was 26 September 2023, when the Court heard oral submissions from both parties. This is now the Court's judgment on that issue.
2. By a Contract No. EBRD/CW 02/2016 made on 30 November 2017, JSC National Company QazAvtoJol ("QAJol"), which is the Claimant in Case 5 and Defendant in Case No. 7, engaged Todini & SMS ("Todini"), which is the Claimant in Case No. 7 and the Defendant in Case No 5, as contractors to construct a highway. Todini is, evidently, a joint venture company formed on the initiative of an Italian construction company Todini Costruzioni Generali S.p.A. to contract with QAJol, a Kazakh company.
3. The Contract incorporated, inter alia, the "FIDIC" (the Fédération Internationale des Ingénieurs-Conseils) General Conditions of Contract ("GCC") supplemented by an Appendix, which make provision for circumstances in which a contractor may claim extra payment and/or time for completion. By letter dated 7 June 2022 Todini requested (under Sub-Clause 20.1 of the FIDIC Conditions) the project Engineer's determination in respect of a claim for an extension of time and extra compensation. Pursuant to this request, the Engineer issued a determination dated 1 July 2022 accepting Todini's claim to the extent of a 165 day extension and compensation of 1,033,435,835 tenge. Todini was not satisfied with this determination. Either party was, under the contract provisions, entitled to reopen any Engineer's determination by putting the matter before a Dispute Board ("DB"). Todini evidently communicated its disagreement with the Engineer's determination. The parties engaged in unsuccessful attempts to settle the whole substantive dispute between them. After these failed, the parties by an "Additional Agreement dated .... September 2022" made provision for further review of the substantive dispute by what they described as a "DAB". This Additional Agreement is variously referred to as made on 14 or 15 September 2022. It makes no difference in this case which is correct. The Additional Agreement was clearly conceived at the same time as a tripartite Dispute Settlement Agreement dated 15 September 2022, by which Mr Bilyalov Kambar Rahmetovich was appointed as the DAB. I shall for convenience refer to the Additional Agreement as the Additional Agreement of 14 September 2022, to distinguish it from the tripartite Dispute Settlement Agreement of 15 September 2022.

4. Under the original contract provisions, even a DB decision would not have been final in all circumstances. Provided that a Notice of Dissatisfaction was given within 28 days, then it too could, under Sub-Clauses 20.4 and 20.6 of the GCC, read with a contractually agreed Appendix, have been challenged by commencing an International Chamber of Commerce (“ICC”) arbitration seated in Moscow. The present dispute arises, in summary, because the parties did not simply operate or reproduce the original contract provisions, in particular those of the GCC, but included in the Additional Agreement of 14 September 2022 a provision that “Any decisions of the ‘DAB’ will be final and binding” between the Parties.
5. Todini on 4 October 2022 set out its case on the substantive issue of extra time and payment in a detailed written submission expressed to be made to Mr Bilyalov as the DB pursuant to Sub-Clause 20.4 of the GCC. The DAB’s decision, dated 21 October, though it appears only issued to the parties on 28 October 2022, was that QAJol should make an additional payment of 3,680,939,023.36 Tenge and extend Todini’s time for completion by 453 days. By letter dated 18 November 2022 QAJol gave Notice of Dissatisfaction with the DAB decision on grounds summarised in the letter, invoking Sub-Clauses 20.4 and 20.6 of the GCC and proposing further efforts at amicable settlement, while indicating its intention to go to arbitration under Sub-Clause 20.6, if those efforts failed.
6. By a yet further Additional Agreement No. 2 dated 8 December 2022, the parties identified the issue which had, by that date, clearly arisen between them as to whether the DAB’s decision was final and binding. They amended the contract, in terms which have led to Cases Nos. 5 and 7 being brought in the AIFC Court; and they agreed that QAJol would, pending the Court’s decision on the issue of finality, make the payment and grant the extension ordered by the DAB. The terms of this Additional Agreement also provide for the position according to whether the Court’s decision is in favour of QAJol or Todini. QAJol submits that the Additional Agreement of 8 December 2022 support its case that the DAB decision is not final and binding, and that its terms permit reopening before the AIFC Court of the substantive issue whether any and what extra time and payment is due.
7. The above summarises the basis on which Cases Nos 5 and 7 have been begun in the AIFC Court. In Case No 5 QAJol seeks to reopen the decision of the DAB before the AIFC Court. In Case No 7, Todini maintains that the parties, by the Additional Agreement of 14 September 2022, agreed that the DAB’s decision would be final and binding, and that that is the end of the matter.
8. For completeness, the Court records two further points. First, Todini also claimed in Case No 7 an order for payment of the additional 3,680,939,023.36 Tenge into an escrow account and an extension of the time for completion by 453 days, in accordance with the further decision of the DAB. On 15 June 2023,

QAJol accepted that it had only made partial payment of the sum ordered by the DAB, due to a problem relating to Todini's rating with Bank of New York Mellon, but that an escrow account was being opened into which the balance due would be paid. By its Order dated 12 July 2023, the Court held that, subject to considering any submissions to the contrary (to be received within seven days of the date of such Order), Todini was entitled to an order for payment into escrow of the balance then unpaid (that is, 2,942,770,569.13 Tenge). No such contrary submissions having been received, the Court's Order for payment into escrow of 2,942,770,569.13 Tenge took effect, and was the Court understands complied with, accordingly. Second, Todini in an application dated 10 June 2023 sought to expand its claim in Case No 7 to include further claims for payment in US dollars and interest. By Order dated 12 July 2023, the Court expressed the view that, subject to considering any further submissions, these expanded claims fell outside the scope of the Case No 7, and were thus inadmissible. No reason having been shown for any contrary view, the expanded claims do not therefore arise or call for further consideration. The issue now for determination is simply whether the DAB decision is final and binding for all purposes or remains susceptible to be being reopened by QAJol.

#### *The Contract*

9. In order to determine the issue whether the DAB decision is final and binding, it is necessary to consider the Contract and subsequent Agreements in greater detail. The Contract makes extensive provision for circumstances in which Todini might claim an extension of time for completion and/or additional payment. The "FIDIC" GCC and Appendix provided that:

(i) Todini was entitled in the first instance, to request the construction project's Engineer to determine and certify whether or not any such claim was good. (Sub-Clause 20.1).

(ii) If either party disputed an Engineer's certificate or determination, it was entitled to refer such dispute to a "Dispute Board" ("DB") consisting of "one sole member" appointed (if not agreed) by the President of FIDIC (Sub-Clause 20.2, read with the Appendix).

(iii) The DB's decision was to be

"binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below". (Sub-Clause 20.4).

(iv) If either party was dissatisfied with the DB's decision it was entitled within 28 days to give a Notice of Dissatisfaction;

"If the DB has given its decision as to a matter in dispute to both Parties, and no Notice of Dissatisfaction has been given by either Party within 28 days after it received the DB's

decision, then the decision shall become final and binding upon both Parties” (Sub-Clause 20.4).

- (v) “Where a Notice of Dissatisfaction has been given under Sub-Clause 20.4 above, both parties shall attempt to settle the dispute amicably before the commencement of arbitration. However, unless both parties agree otherwise, the Party giving a Notice of Dissatisfaction in accordance with Sub-Clause 20.4 above should move to commence arbitration after the fifty-sixth day from the day on which a Notice of Dissatisfaction was given, even if no attempt at an amicable settlement has been made” (Sub-Clause 20.5).
- (vi) “Any dispute between the Parties arising out of or in connection with the Contract not settled amicably in accordance with Sub-Clause 20.5 above and in respect of which the DB’s decision (if any) has not become final and binding shall be finally settled by arbitration. (Sub-Clause 20.6).
- (vii) Sub-Clause 20.6 went on to provide for various ways in which any such arbitration could be conducted, including, in the case of a contract with foreign contractors (as this was evidently treated as being) “proceedings administered by the International Chamber of Commerce (ICC) and conducted under the ICC Rules of Arbitration”. (Sub-Clause 20.6(a)). The Appendix selected the mode by a provision stating:

“Rules of Arbitration 20.6(a) Institution is International Chamber of Commerce, Moscow, and the Arbitration Rules will be that of UNCITRAL”.

#### *The Contract as amended*

10. Sub-Clause 20.2 read with the Appendix of the FIDIC GCC provided that the parties should, if possible, agree on a single suitably qualified person to act as the DB and should further reach an agreement with him for remuneration (of which each party was to pay one-half). After their unsuccessful settlement discussions, QAJol accordingly wrote to Todini on 12 September 2022 as follows:

“Taking into account the completion of the construction period under the Contract (July 30, 2022), the Contractor’s claims, due to the lack of agreement between the parties on the further implementation of the project, guided by clause 20.2 of the General Conditions of the Contract, we send for signing a draft Agreement on Dispute Adjudication Board, and also propose the candidacy of Bilyalov Kambar Rahmetovich as a Member of the Dispute Adjudication Board”.

11. The letter enclosed three documents:

- a. a letter of the ALE “Kazakhstan National Association of Professional Engineers and Consultants” putting forward three potential Board members, one of whom was Mr Bilyalov;
- b. a draft tripartite agreement (in English and Russian) for Mr Bilyalov’s appointment as a sole Board member, which was the progenitor of the tripartite Dispute Settlement Agreement dated 15 September 2022; and
- c. a draft Additional Agreement (in English and Russian) which became the Additional Agreement of 14 September 2022.

12. The draft Additional Agreement referred to at c) read as follows:

“Considering that the Conditions of Contract for Construction – For Building and Engineering Works Designed by the Employer – is the FIDIC Multilateral Development Bank Harmonised Edition 2010 The Parties shall appoint a Dispute Adjudication Board (hereinafter abbreviated as ‘DAB’ in accordance with Sub-Clause 20.2 of the General and Particular Conditions of the Contract).

The DAB shall be comprised of one sole member in accordance with Sub-Clause 20.2 of the Particular Conditions of the Contract.

Considering that the Employer and the Contractor have concluded the Contract EBRD/CW 02/2016 .... (hereinafter – the Contract) and wish to jointly appoint a Member of the Dispute Resolution Board to act as a single judge, also referred to as the Dispute Adjudication Board ....

Considering also the letter of the ALE “Kazakhstan National Association of Professional Engineers and Consultants” dated September 6, 2022,

The parties agree as follows:

**“1. Appointment of the sole member “DAB” for the Contract**

Guided by clause 20.2 of the General Conditions of the Contract, the Parties .... agreed to appoint Mr Bilyalov Kambay Rakhmetovich, .... as the sole participant of the DAB under the Contract.

**2. Other provisions**

2.1 Any decisions of the DAB will be final and binding between the parties.

2.2 This Additional Agreement shall enter into full force from the date of signing of the Additional Agreement ...”

13. Todini returned the draft with proposed amendments. These would, inter alia, have deletion of the word “Adjudication” and “Resolution” in the phrases “Dispute Adjudication Board” and “Dispute Resolution Board”; insertion of an additional rider; and replacement of the reference to appointing a single “judge” with a reference to appointing a single “arbitrator”. The recitals would thus have read:

“Considering that the Conditions of Contract for Construction – For Building and Engineering Works Designed by the Employer – is the FIDIC Multilateral Development Bank Harmonised Edition 2010 The Parties shall appoint a Dispute ~~Adjudication~~ Board (hereinafter abbreviated as ‘DAB’ in accordance with Sub-Clause 20.2 of the General and Particular Conditions of the Contract.

Disputes shall be decided by a ‘DB’ in accordance with Sub-Clause 20.4 [Obtaining Dispute Board’s Decision] of the General Conditions of Contract

Considering that the Employer and the Contractor have concluded the Contract EBRD/CW 02/2016 ... (hereinafter referred to as – the Contract) and wish to jointly appoint a Member of the Dispute ~~Resolution~~ Board to act as a single arbitrator judge, also referred to as the Dispute ~~Adjudication~~ Board ....”

14. In the event, and for whatever reason, the Additional Agreement of 14 September 2022 was signed by the parties in the terms proposed by QAJol, not those of Todini’s proposed redraft.

15. As to draft tripartite agreement for appointment of Mr Bilyalov, referred to at b) above, this stated

“The Customer, the Contractor and DB have entered into this Dispute Settlement Agreement (the “Agreement”) and have agreed as follows:

1. The terms and conditions of this Agreement include the ‘General Terms and Conditions of the Dispute Settlement Agreement’ which are attached to the General Terms and Conditions of the Contract, agreed edition by MDB, June 2010, and the following provisions. In these

provisions, which include amendments to the General Terms and Conditions of the Dispute Board Agreement, the words and phrases have the same meanings assigned to them in the General Terms and Conditions of the Dispute Board Agreement.

2. The following details of amendments to the general terms and conditions of the Agreement:
  - > Appendix to the Agreement 'General Terms and Conditions of the Agreement'
  - > Appendices to the Agreement 'Procedural Rules'

16. The draft went on to provide for Mr Bilyalov's fees, and then:

"4. Subject to these fees and other payments to be made by the Customer and the Contractor in accordance with Clause 6 of the 'General Terms and Conditions of the Agreement', DB agrees to act as the Dispute Board (as arbitrator) under this Agreement".

17. An amended draft, by inference put forward by Todini, proposed various amendments, shown as follows:

"1. The Customer, the Contractor and DB Board Member have entered into this Dispute Settlement Agreement (the "Agreement") and have agreed as follows:

The terms and conditions of this Agreement include the 'General Terms and Conditions of the Dispute Settlement Agreement' which are attached to the General Terms and Conditions of the 'Terms and Conditions of the Construction' Contract, of the Multinational Development Bank, Harmonised Edition June 2010, published by the International Federation of Consulting Engineers ('FIDIC') and subsequent terms and conditions, ~~agreed edition by MDB, June 2010, and the following provisions.~~ In these ~~provisions~~ terms and conditions, which include amendments to the General Terms and Conditions of the Dispute Board Settlement Agreement, the words and phrases have the same meanings assigned to them in the General Terms and Conditions of the Dispute Board Settlement Agreement.

2. The following ~~details of~~ amendments to the gGeneral tTerms and eConditions of the Agreement:

2.1 The Contractor shall submit a Dispute Appeal to the Board for resolution within ... 21 days from the date of signing of this Agreement;

2.2 The Customer shall submit its response to the Contractor's Dispute Appeal to the Board within ... 28 days from the date of signing of this Agreement;

2.3 The Board shall render its Decision on the dispute within ... 45 calendar days from the date of signing of this Agreement

~~> Appendix to the Agreement 'General Terms and Conditions of the Agreement'~~

~~> Appendices to the Agreement 'Procedural Rules'~~

18. In the event, the appointment of Mr Bilyalov was agreed under and in the terms of the amended draft dated 15 September 2022, albeit only in the Russian language version.

19. Following the issue of its decision dated 21 October 2022 by the DAB in the person of Mr Bilyalov, the present issue arose whether or not that decision was the end of the matter and precluded QAJol from contending in any further forum that no or a lesser payment and extension to those found by Mr Bilyalov was appropriate.



20. In these circumstances, the parties made a yet further agreement. By the Contract Amendment No 2 dated 8 December 2022, referred to in paragraph 6 above, they recited the background consisting of Todini's claim to extra time and payment, the Engineer's determination of 1 July 2022 and the Dispute Board decision dated 21 October 2022, and continued:

**"Preamble**

....

The Employer disagrees with the Engineer's Determination and the DB Decision. In this regard, pursuant to the provisions of the Contract the Employer shall refer this matter to the Court of the Astana International Financial Centre (AIFC) in Astana in order to resolve the dispute in relation to the amount of reimbursement and an extension of Time for Completion.

However, taking into account the protracted terms for resolving this issue and in order to continue and complete the Works the Employer will pay the reimbursement in the amount of 3,680,939,023.36 Tenge and extend the time for completion by 453 days pursuant to the DB Decision.

The Contractor, in accordance with the Dispute Board Agreement signed on the 15 September 2022, considers the Dispute Board decision Final and Binding.

The Employer considers the Dispute Board decision, binding, under Sub-Clause 20.4 of the GCC, but not final.

**In view of the foregoing, Party decided:**

1. Amend the Contract as follows.

1.1 Amend Sub-Clause 20.6(a) (Rules of Arbitration) of the Appendix to Tender Part A, Particular Conditions, Contract Data instead of 'International Chamber of Commerce' to 'Astana International Financial Centre' (hereinafter referred to as the AIFC Court).

2. The Parties agreed that, the Employer will make a payment in the amount of 3,680,939,023.36 tenge to the special escrow account of the 'SP' 'SineMidasStroy' LLP' and extend the Time for Completion for 453 days from the date of this Amendment No 2 pursuant to Sub-Clause 2.1 of Amendment dated '.....' September, and further to the DB Decision, which is, in the Employer's opinion, binding but not final under Sub-Clause 20.4 of the GCC. However the Employer shall refer to the court this matter.

2.1 In this case, if the decision is in favour of the Employer, the Contractor undertakes to return fully the amount of the reimbursement within 84 days after the Court's official decision.

2.2 In this case, if the decision is in favour of the Contractor, the Employer shall not claim from the Contractor to refund the amounts paid and apply Delay Damages to the Contractor.

3. This Contract Amendment No. 2 is an integral part of the Contract and shall come into force from the date of its signature and shall be valid until the Parties fully fulfil their obligations under the Contract.

4. The Parties agree that the remaining conditions of the Contract not affected by this Addendum shall remain unchanged".

***The Law***

21. Under Appendix A to Tender / Part A of Particular Conditions – Contract Data in the Contract, Sub-Clause 1.4 provides for the Governing Law to be the Law of the Republic of Kazakhstan and the ruling language Russian.

22. The Contract falls therefore to be construed in accordance with the principles of construction applicable under the Kazakh Civil Code. These include the following in Chapter 22:

“Article 380. Freedom of Contract

1. Citizens and legal entities shall be free in concluding agreements. ....

2. Parties may conclude agreements both as provided for and as not provided for by legislation.

....

Article 382. Defining Provisions of an Agreement

1. Provisions of an agreement shall be defined at the discretion of the parties, except for the cases where the contents of a certain provision are prescribed by legislation.

.....

Article 392. Interpretation of an Agreement

1. When interpreting provisions of an agreement, the court shall take into account the literal meaning of the words and expressions contained in it. The literal meaning of a provision of an agreement, where unclear, shall be established by way of comparing that with other conditions and the sense of the agreement as a whole.

2. Where the rules contained in paragraph 1 of this Article do not allow to understand the contents of an agreement, the actual common will of the parties must be identified taking into account the objective of the agreement. In that respect, any relevant circumstances, including the negotiations preceding the agreement, and a letter exchange, the practice prevailing in the mutual relations of the parties, tradition of business practice, the subsequent conduct of the parties, shall be taken into account.”

*Analysis*

23. The Court has to address the core issue of construction now before applying the principles of law stated in these Articles of the Civil Code. The primary focus under the principle in Article 392.1 of the Civil Code is on the literal meaning of any provision being interpreted, but where this is unclear then the relevant provision is to be compared with and understood in the light of all the contractual conditions “and the sense of the agreement as a whole”. In the case of a written agreement contained in a document signed by both parties, that points to a relatively confined exercise. Where the written agreement is to implement, supplement or vary some prior agreement, then it must, no doubt, also be admissible, at least in any case of doubt, to compare the later agreement with and read it in the context of the earlier agreement. Bearing in mind that the Additional Agreement of 14 September 2022 was negotiated and made effectively simultaneously with the tripartite Dispute Settlement Agreement dated 15 September 2022, for a common purpose, it may also be legitimate to have regard to the wording of that Agreement. But that is not critical in this case.

24. How far it may in all circumstances be appropriate to read Article 392 as containing two entirely distinct stages in any exercise of contractual construction is not a matter which I need consider in this case. In English law, it is a common-place that construction is an “iterative” process, in the course of which it may be appear that the “objective of the agreement” and surrounding circumstances such as those mentioned in Article 392.2 influence what would or might otherwise be understood as the literal meaning of the words used. Whatever may be the position in this regard under Kazakh law is immaterial to the outcome of the present case.
25. The starting point, both chronologically and logically, is the Additional Agreement of 14 September 2022. Having considered this, it will thereafter be appropriate to consider QAJol’s reliance on the Contract Amendment No. 2 dated 8 December 2022 as supporting its case that it is entitled now to have the substantive merits considered by the AIFC Court.
26. In the Court’s view, the literal meaning of the words and expressions contained in the Additional Agreement of 14 September 2022 is clear and is confirmed by the sense of the agreement as a whole. It is to make the DAB or DB a final decision-maker and to foreclose the right which QAJol would otherwise have had, under Sub-Clauses 20.4 and 20.6 of the FIDIC GCC, of taking to another forum (more particularly, ICC arbitration in Moscow) its dissatisfaction with the DAB’s decision.
27. First and foremost, Clause 2.1 in the Additional Agreement of 14 September 2022, provides clearly and on its face unambiguously that “Any decisions of the ‘DAB’ will be final and binding between the Parties”. Further, that wording relates closely to the provisions of Sub-Clauses 20.4 and 20.6 of the FIDIC GCC, which are at pains to make clear whether and when a Dispute Board decision is or is not “final and binding”. The parties clearly had the FIDIC GCC very much in mind when drafting and agreeing the Additional Agreement of 14 September 2022 (as also the Dispute Settlement Agreement of 15 September 2022). As Todini observed without contradiction in oral submissions at the hearing, both parties are commercial concerns anyway likely to have been very familiar with the scheme of the FIDIC GCC. The parties were by their Additional Agreement of 14 September 2022 expressly addressing FIDIC conditions which provide that, in some circumstances (failure to give or lateness of a Notice of Dissatisfaction), a DB decision is “final and binding”. A natural inference from their use in the Additional Agreement of the very same phrase – final and binding – in relation to “any decisions of the DAB” is that they were prescribing a regime which would differ from that otherwise applicable under the unamended CCC and would make the DAB decision binding in all circumstances.
28. Second, in the Additional Agreement dated 14 September 2022, the parties chose to use other words commonly associated with finality. In particular, they referred to “Adjudication” and to Mr Bilyalov as

“judge” in the former Agreement. (The word “arbitrator” was also used to describe Mr Bilyalov’s role in the Dispute Settlement Agreement of 15 September 2022.)

29. It may be suggested, against such a construction, that still clearer language might have been used, before the parties should be understood as having effectively cut short the elaborate procedure which their original Contract unquestionably allowed, involving potentially a fresh review of the substantive merits and of the Engineer’s and Mr Bilyalov’s decisions before an ICC arbitration tribunal, seated in Moscow. That suggestion cannot, however, in the Court’s view prevail against the considerations set out in paragraphs 27 and 28 above. In particular, the wording which the parties agreed - “Any decisions of the ‘DAB’ will be final and binding between the Parties” – is clear in effect.
30. I do not therefore consider it necessary to turn to the principle contained in Article 392.2 in order to arrive at the proper construction of the Additional Agreement of 14 September 2022. But, if one does look at the objective of that Agreement more widely in the light of other surrounding circumstances, this also appears consistent with an intention to achieve finality.
31. In this connection, the Court was informed that the parties had been seeking, unsuccessfully, to arrive at a consensual settlement of the substantive issues between them before they set about negotiating and agreeing the Additional Agreement of 14 September 2022 and the Dispute Settlement Agreement of 15 September 2022. That makes it at least understandable that they would, when their efforts at consensual settlement proved unsuccessful, wish to agree some other short-circuit means of finally resolving the substantive issues between them regarding the extent of any extra time and compensation due - rather than treating any DAB decision as no more potentially than another step leading to another determination in a yet further forum (ICC arbitration seated in Moscow under the original contract terms). Making the DAB decision final and binding would have achieved such an objective.
32. The documents provided by Todini in fact contain internal email messages between Todini personnel on 5 September 2022, which appear to confirm that this was Todini’s objective. However, there is no suggestion that these messages reached or were known to QAJol at any material time, and so I cannot regard them as relevant background to the parties’ mutual exchanges and agreement of the 14 September 2022 agreement. Indeed, there is no evidence of any background (apart from the taking place of unsuccessful settlement negotiations) to QAJol’s proposal of the draft wording sent with its letter of 12 September 2022 (paragraph 10 above). It must be taken as it stands.
33. Thus far, therefore, the position is that the clear effect of the Additional Agreement of 14 September 2022 appears to be and to have been intended to be to make the decision of the DAB given on 21 October 2022 final and binding to the exclusion of any further right of challenge which would otherwise have

existed under Sub-Clauses 20.4 and 20.6 of the FIDIC GCC. In this light, therefore, the Court turns to the Contract Amendment No. 2 of 8 December 2022. In its submissions at the hearing, QAJol relied on this Amendment as showing or providing that the DAB decision was not final and could be revisited before the AIFC Court.

34. QAJol's submissions may in this respect be viewed as falling under two potential heads. First, under Article 392.2 of the Civil Code, the subsequent conduct of the parties may, at least in some contexts, also be relevant to be taken into account in the construction of an earlier agreement, here the Additional Agreement of 14 September 2022. Second, QAJol relied on the Contract Amendment No. 2 of 8 December 2022 as itself providing it with a right to challenge the DAB decision before the AIFC Court, whatever might have been the position under the earlier Additional Agreement No. 2 of 14 September 2022.
35. It is clear that the parties by clause 1.1 of the Contract Amendment No. 2 of 8 December 2022 were replacing ICC arbitration in Moscow with the AIFC Court for the purposes of Sub-Clause 20.6(a) of the FIDIC GCC. Sub-Clause 20.6 is a generally worded dispute resolution provision, covering all and any dispute not settled amicably and not the subject of any final and binding DB decision. On the face of it, clause 1.1 reads as a general amendment of Sub-Clause 20.6(a) for both current and any future purposes under this Contract. It was on any view an amendment for the purposes of the current dispute or disputes referred to in Contract Amendment No. 2 of 8 December 2022.
36. The parties went on in clause 2 to address the interim position, by providing for immediate payment into an escrow account and an immediate extension of time, pending an AIFC Court decision. Lastly, they included provisions addressing the position according to whether the Court's decision is in favour of QAJol or Todini. If it was in favour of QAJol, Todini would reimburse the amount paid into escrow. If it was in favour of Todini, QAJol was to have no claim to recover the escrow amount or to claim damages for delay.
37. The question is what dispute or disputes was or were in mind by these provisions. QAJol submits that what was being remitted to the AIFC Court was and is simply the substantive issue decided by the DAB, namely whether any and if so what extra time and payment was due to Todini under the Contract. In other words, the parties were doing no more than giving effect to the original contractual scheme applicable under Sub-Clauses 20.4 and 20.6 in circumstances where Notice of Dissatisfaction with a Dispute Board decision was given within the permitted time, but replacing ICC arbitration in Moscow with the AIFC Court as the relevant dispute resolution forum.

38. Support for QAJol's submission on this point might be said to be found in the terms of the recital, set out in paragraph 20 above, reading:

"The Employer disagrees with the Engineer's Determination and the DB Decision. In this regard, pursuant to the provisions of the Contract the Employer shall refer this matter to the Court of the Astana International Financial Centre (AIFC) in Astana in order to resolve the dispute in relation to the amount of reimbursement and an extension of Time for Completion."

39. This recital cannot however be read in isolation. The recitals go on to conclude:

"The Contractor, in accordance with the Dispute Board Agreement signed on the 15 September 2022, considers the Dispute Board decision Final and Binding.  
The Employer considers the Dispute Board decision, binding, under Sub-Clause 20.4 of the GCC, but not final."

40. QAJol's submission requires one to accept that, after this careful recital of the parties' radically different views about whether or not the DAB decision was final as well as binding, Todini was agreeing by the operative terms of the agreement to abandon its stance and the benefit of finality for which it had on the face of it contracted on 14 September 2022, and to submit no more than the substantive issues about extra time and compensation to the AIFC Court. That appears to the Court to be an improbable reading of the terms of the Contract Amendment No. 2 of 8 December 2022 and, if one looks further, an improbable agreement for these two parties to have reached. The recital set out in paragraph 38 above demonstrates a willingness and wish on the part of QAJol to remit the substantive issues to the AIFC Court (instead of ICC arbitration in Moscow). But it cannot, as a simple recital and in the context of the next two recitals, be read as an agreement that that course was or should be open to it. The natural reading of the recitals is that, having recited their dispute about whether the DAB decision was final, the parties were providing for its resolution; and that the first matter to be decided was therefore the core issue, whether the DAB decision was final precluding any further recourse. That interpretation is reinforced by Clause 2 of the operative part of Contract Amendment No. 2 of 8 December 2022. That, by its reference to "the DB Decision, which is, in the Employer's opinion, binding but not final under Sub-Clause 20.4 of the GCC", again expressly identifies the issue which had arisen regarding finality. The immediately following words "However, the Employer shall refer to the court this matter", read with Clause 1.1 of the Contract Amendment, involve an agreement that that issue (or "this matter") should be resolved by the AIFC Court – rather than by ICC arbitration in Moscow otherwise prescribed by the general words of unamended Sub-Clause 20.6 of the FIDIC GCC.

41. Only if the AIFC Court decided that issue in favour of QAJol would any question have arisen of a further review, before any forum, of the substantive issues what if any extra time and payment were due. In fact, the parties were agreed before the Court that, if matters reached that stage, the AIFC Court would also

be the agreed forum under the general wording of Clause 1.1 of the Contract Amendment No. 2 of 8 December 2022.

42. As it is, however, the Court considers that Todini is correct in its case on the effect of the parties' various Agreements. The Additional Agreement of 14 September 2022 made the DAB decision final and binding, and excluded any further review before an ICC arbitration tribunal in Moscow. The Contract Amendment No. 2 of 8 December 2022 remitted the dispute, which had by then arisen as to whether this was the effect of the Additional Agreement of 14 September 2022, to the AIFC Court for determination. The recital to the Contract Amendment No. 2 of 8 December 2022 set out in paragraph 38 above cannot be read in isolation, and the other recitals together with Clause 2 of the operative part of Contract Amendment No. 2 of 8 December 2022 would lack any real sense if Todini was by the same document intending to abandon its stance that the DAB decision was final. Further, no reason has been suggested why Todini should have been prepared to abandon its stance. Accordingly, there is nothing in Contract Amendment No. 2 of 8 December 2022 which could affect or change the natural meaning of the Additional Agreement of 14 September 2022; and equally nothing in it which could sensibly be read as an agreement by Todini to abandon its expressed stance, that the Additional Agreement of 14 September 2022 made the DAB decision final as well as binding, in a sense precluding further recourse in any forum.

43. During the hearing, Todini asked the Court not only to determine whether the parties had made the DAB decision of 21 October 2022 final and binding, so precluding any recourse on the substantive issues regarding extra time and payment in any other forum, but also to hold that any and all future decisions of the DAB should be final and binding in this sense. As to that, the Court is only concerned with one actual DAB decision, that of 21 October 2022. The Court did not hear submissions as to whether there are any circumstances under which the DAB constituted by Mr Bilyalov's appointment pursuant to the Additional Agreement of 14 September 2022 and the tripartite Dispute Settlement Agreement of 15 September 2022 could issue any further decision on some future issue not decided by its decision of 21 October 2022. If it could, then it may be that any such further decision would, under Clause 2.1 of the Additional Agreement of 14 September 2022, also be final as well as binding, in a sense precluding any further recourse. But, the Court does not propose to explore or decide any of such matters. The Court's decision is confined to the particular circumstances of the DAB decision of 21 October 2022 which is in issue before it.

### *Conclusion*

44. For the reasons given, the Court concludes that the determination of the Dispute Adjudication Board consisting of Mr Bilyalov dated 21 October 2022 was and is final and binding as between the parties and

that, under clause 2.2 of the Contract Amendment dated 8 December 2022, this precludes any further challenge in any forum to the substantive merits of that Board’s decision.

45. The parties are at liberty to make submissions in writing on costs (including as the amounts of any costs which should be paid by one party to the other) within 1 week after the issue of this judgment, after which the Court will issue a separate ruling on costs.

By Order of the Court,

The Rt. Hon. The Lord Mance  
Chief Justice, AIFC Court

**Representation:**

**CASE No: AIFC-C/CFI/2023/0005**

The Claimant was represented by Ms. Aigerim Zeinesheva, Chief Manager of the Department of Legal and Human Resources of National Company “QazAvtoJol” JSC, Astana, Kazakhstan.

The Defendant was represented by Mr. Valikhan Shaikenov, Principal, Juris Consultus, Shaikenov Law Experts (SHEL), Almaty, Kazakhstan.

**CASE No: AIFC-C/CFI/2023/0007**

The Claimant was represented by Mr. Valikhan Shaikenov, Principal, Juris Consultus, Shaikenov Law Experts (SHEL), Almaty, Kazakhstan.

The Defendant was represented by Ms. Aigerim Zeinesheva, Chief Manager of the Department of Legal and Human Resources of National Company “QazAvtoJol” JSC, Astana, Kazakhstan.



IN THE COURT OF FIRST INSTANCE  
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

7 June 2023

CASE No: AIFC-C/CFI/2023/0004

Grantly LLP

Appellant

v.

Mr Riskulov Rustam Daniyar Ugli

Respondent

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JUDGMENT

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Justice of the Court:

Justice Sir Stephen Richards

**ORDER**

**The application for permission to appeal is refused.**

**JUDGMENT**

1. This is an application by Grantly LLP (“Grantly”) for permission to appeal a decision of the AIFC Small Claims Court (“the SCC”) dated 23 December 2022 in Case No. AIFC-C/SCC/2022/0022 by which the SCC gave judgment for the Claimant, Mr Riskulov Rustam Daniyar Ugli, against the Defendant, Grantly, and ordered Grantly to pay the Claimant USD 35,000.
2. Rule 29.6 of the AIFC Court Rules provides that permission to appeal may be given where the appeal Court considers that (1) the appeal would have a real prospect of success or (2) there is some other compelling reason why the appeal should be heard. By Rule 29.7 success on an appeal depends on establishing that the decision of the lower Court was (1) wrong or (2) unjust because of a serious procedural or other irregularity in the proceedings in the lower Court.
3. The SCC noted at paragraph 2 of its judgment that Grantly had failed to file a defence even within the extended time allowed to it and had not responded to the substance of the claim at all. In the absence of provision for default judgment in claims in the SCC, the Court proceeded to determine the claim on the evidence submitted by the Claimant and without a hearing, pursuant to rule 28.39 of the AIFC Court Rules. The claim related to a contract for the provision of services by the Claimant as an education expert. The Court found on the evidence that the conditions for payment of the sum claimed under the contract had been met.
4. The application for permission to appeal advances merely a generalised contention that the arguments on which the SCC’s decision was based were unfounded “and evidence presented by [the Claimant] is unfounded since [the Claimant] did not actually fulfil the obligations assumed under the contract, which caused damage to LLP Grantly since the defendant did not receive what was expected during the execution of the contract and met the losses, related to non-receipt of accreditations/permits stipulated by the present contract”. The remedy sought from this Court is “to provide an opportunity to file an application against the decision of [the SCC] and to prove that the stated claims of [the Claimant] are refused within the framework of their consideration in [the SCC], on grounds of his failure to fulfil his obligations, which led to the defendant counting on the execution of the contract and not receive it but meeting the losses incurred in this case”.
5. There is no merit in such an application. Grantly had a proper opportunity to advance a defence case, with supporting evidence, in the SCC but did not do so. It has not even attempted to justify or explain its failure to participate substantively in the SCC proceedings. It cannot turn round now and expect to advance a defence case for the first time on appeal. In any event, the generalised assertions in the application for permission to appeal do not begin to undermine the evidence-based findings of the SCC in its decision or to show that the decision was wrong.
6. Accordingly, an appeal would have no real prospect of success, and there is no other compelling reason why an appeal should be heard. Permission to appeal is therefore refused.



By the Court,

The Rt Hon. Sir Stephen Richards

Justice, AIFC Court

Representation:

The Appellant was represented by Mr. Valentin Lobach, external counsel, Almaty, Kazakhstan.

The Respondent was represented by himself.

IN THE COURT OF FIRST INSTANCE  
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

2 May 2023

CASE No: AIFC-C/CFI/2023/0003

**Qosil Limited Private Company**

**Appellant**

**v**

**Kozhabay Abdilda Alibekuly**

**Respondent**

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**JUDGMENT**

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**Justice of the Court:**

**Justice Sir Stephen Richards**

## **ORDER**

**The application for permission to appeal is refused.**

## **JUDGMENT**

1. By a judgment dated 19 December 2022 in Case No. AIFC-C/SCC/2022/0021 the AIFC Small Claims Court (“the SCC”) allowed a claim by Mr Abdilda Kozhabay (“the Claimant”) for damages against Qosil Limited (“the Defendant”) in connection with the termination of what he said was an employment contract between them. The claim was brought in reliance on the AIFC Employment Regulations, AIFC Regulations No.4 of 2017 (“the Employment Regulations”). As recorded in the judgment, the SCC had the benefit of written evidence and submissions from each party, which were elaborated at a remote hearing via Zoom at which the Claimant represented himself and Mr Batykov represented the Defendant. Two issues were identified for determination by the Court: (1) did the Claimant have an employment contract to which the Employment Regulations were applicable? and (2) if so, what if any damages was the Claimant entitled to? The Court answered the first question in the affirmative and held in relation to the second question that the Claimant was entitled to payment of 648,538 tenge.
2. By an application form issued on 23 February 2023 the Defendant applied to the AIFC Court of First Instance for permission to appeal that decision. The Claimant filed a bare objection to the application, choosing not to exercise to any greater extent his right under Rule 29.13 of the AIFC Court Rules to make written submissions in opposition to an application for permission to appeal.
3. In its application form the Defendant has requested an oral hearing. I am satisfied, however, that the application can be fairly determined on paper without an oral hearing (see Rule 29.17 of the AIFC Court Rules).
4. Rule 29.6 of the AIFC Court Rules provides that permission to appeal may be given where the appeal Court considers that (1) the appeal would have a real prospect of success or (2) there is some other compelling reason why the appeal should be heard. By Rule 29.7 success on an appeal depends on establishing that the decision of the lower Court was (1) wrong or (2) unjust because of a serious procedural or other irregularity in the proceedings in the lower Court.
5. The first set of submissions made by the Defendant in support of the application comes under the heading “The factual circumstances of the case asserted by the court in the Decision are untrue”. The core of the challenge is to a series of findings about the Defendant’s offer of a job to the Claimant. The Claimant’s statements accepted by the Court are variously described as untrue, unsupported by evidence, unsubstantiated and not valid. It is submitted that the Court was wrong to accept them, that the Court committed a serious procedural violation in failing to demand proof of the Claimant’s allegations, that the Court was not in a position to make an objective and fair decision, and further that there was a failure to follow the procedures set out in Part 18 of the AIFC Court Rules concerning matters of evidence. In my judgment, however, none of those points is arguable. Hearings in the

SCC are intended to be informal and the strict rules of evidence do not apply (see, for example, Rules 28.29-28.35 of the AIFC Court Rules; see also Rule 28.7(6), by which the only provisions of Part 18 that are specifically applied to small claims are the powers in Rules 18.1 and 18.6 to control evidence). The Court has a wide discretion in the matter. I am satisfied that there was nothing wrong with the Court's approach to the evidence in this case and that the factual findings made by the Court, including in particular its acceptance of the Claimant's statements, were properly open to it.

6. The second set of submissions in support of the application for permission to appeal comes under the heading "The court's position on the validity of the Employment Contract". This concerns the SCC's finding of the existence of an employment contract on either or both of two bases: (i) ostensible or apparent authority, on principles derived from *Freeman & Lockyer (A Firm) v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 786 and subsequent case-law, principles that the Court considered were to be applied in the context of the Employment Regulations; and (ii) through conduct the Defendant assumed the terms of the contract and/or was estopped from denying that it was bound by the terms of the contract. The Court also advanced purposive reasons for interpreting the Employment Regulations in the way it did. The Defendant's challenge under this heading is based primarily on its criticisms, already considered, of the factual findings made by the Court; and it is submitted that the conditions in *Freeman & Lockyer* were not met. I am satisfied, however, that on the factual findings properly made by the Court the conditions for a finding of ostensible or apparent authority were met and that the Court was correct to apply those principles in the context of the Employment Regulations: the contrary argument has no real prospect of success. Since that provides a sufficient basis for the Court's finding of an employment contract, it is not necessary to consider the Defendant's further criticisms of the alternative basis considered by the Court or of the purposive reasons advanced (though I do not accept the validity of any of those criticisms).
7. The third set of submissions in support of the application for permission to appeal comes under the heading "Calculation of the amount to be recovered". The Defendant takes issue with the SCC's finding that, in addition to the wages due under the contract for the period during which the Claimant worked for the Defendant, he was entitled to 7 days' paid notice, and therefore an additional sum of 86,538 tenge, pursuant to Regulation 60(2) of the Employment Regulations. Regulation 60(2) provides that if the Employee has been continuously employed by the Employer for 1 month or more, "the notice required to be given by the Employer ... to terminate the Employee's employment must not be less than (a) 7 days, if the period of continuous employment is less than 3 months". The Defendant argues that the provision does not determine that the period of notice is *paid*. There is no substance to that point: it is obvious that the period of notice laid down is a period of continued employment for which the Employee is entitled to be paid. The Defendant also refers to Regulation 65 of the Employment Regulations, but that simply provides that an Employee has no rights to compensation or payments from the Employer on the termination of employment apart from rights under the Regulations, rules made under the Regulations and the contract of employment itself. It does not alter the effect of Regulation 60(2), upon which the SCC correctly relied for the finding that the Claimant was entitled to the additional sum of 86,538 tenge.

8. Accordingly, I am satisfied that an appeal from the decision of the SCC would have no real prospect of success. Nor is there any other compelling reason why an appeal should be heard. It follows that the application for permission to appeal must be refused.

By the Court,

**Representation:**

The Appellant was represented by Mr. Rauan Batykov, lawyer, ILFA & A International Law Firm.

The Respondent was represented by himself.

IN THE COURT OF FIRST INSTANCE  
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

31 October 2023

CASE No: AIFC-C/CFI/2023/0002

MICHAEL WILSON & PARTNERS, LIMITED

Claimant

v

(1) CJSC KAZSUBTON and (2) KAZPHOSPHATE LLP,  
(3) KAZPHOSPHATE LIMITED

Defendants

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JUDGMENT ON COSTS APPLICATION

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Chief Justice of the Court

The Rt. Hon. The Lord Mance



## JUDGMENT

1. The Court has before it applications by the Second and Third Defendants for orders that their costs of this litigation to date be paid by the Claimant, Michael Wilson & Partners LLP. There is no doubt, in the light of the Court's judgment dated 26 September 2023, that the Second and Third Defendants were the successful parties in this litigation. The Claimant's claim was also dismissed as against the First Defendant, but it played no active part in the case and has not made any claim to costs.
2. The Claimant's claim was to register or enforce in or through the AIFC Court English and Netherlands judgments obtained against the First, Second and, as it appeared, Third Defendants. The attempt was originally described as a claim within the express heads of the Court's jurisdiction, but was later explained as a simple application, needing no such jurisdictional basis. It was accompanied by the filing of extensive documentation, some of no apparent relevance. As against the Third Defendant it had the unpromising feature that none of the English or Netherlands judgments was against the Third Defendant. The claim was accompanied by a number of untenable submissions, e.g. regarding supposed submission to the jurisdiction or supposed general common law (or the DIFC Courts) practice to recognize foreign judgments without any Treaty or other jurisdictional basis for so doing.
3. The starting point is that the successful Second and Third Defendants, who now seek their costs, are entitled to them: see AIFC Court Rule 26.5(1). I see no basis for any different order in this case. The fact that the Second Defendant is a judgment debtor in England and/or the Netherlands does not in my view alter that. Although the present case was brought in an attempt to enforce the relevant judgments, it was and is in all other respects a separate piece of litigation, involving entirely separate issues, as the judgment handed down on the substantive issues on 26 September 2023 demonstrates. As the same judgment also indicates, the claim has been presented in an expansive and expensive way, with a number of points made proving in reality to lack any real prospect of success from the outset.
4. In the light of the Court's knowledge of the case, and the materials which have been put before the Court, and the submissions and exchanges which have taken place between the parties and the Court, since its judgment on 26 September 2023, the Court considers that this is a case where it can and should make an immediate assessment of costs under Court Rule 26, rather than postpone them for detailed assessment, by whomsoever that would take place. The following paragraphs constitute the Court's immediate assessment of the costs reasonably, necessarily and proportionately incurred by the Second and Third Defendants in their conduct of this litigation.

5. As to the quantum of costs, both the Second and the Third Defendants have produced, in my view, and despite the Claimant's attempts to raise objections (many again without apparent basis) ample documentation to explain their costs claims.
6. The Second Defendant's costs, put at USD 6,960.00 or 3,361,249 Tenge legal costs and USD 7,278.45 or 3,514,987 Tenge, appear to the Court entirely appropriate for their award in full, bearing in mind the scope, nature and importance of the questions arising in the case, and the Court orders their payment by the Claimant accordingly.
7. The Third Defendant's costs are somewhat larger, totaling USD 16,116.80 to 19 April 2023 and USD 18,011.90 thereafter, but they are supported by careful itemisations of their make-up. Again, they appear to the Court to be entirely appropriate for their award in full, bearing in mind the scope, nature and importance of the questions arising in the case. It is entirely understandable that an English company, brought to Kazakhstan to defend an unfounded attempt to have registered against it judgments against two different companies, should incur somewhat larger legal costs. I will therefore order that the Claimant also pay to the Third Defendant its costs in full.

By Order of the Court,

The Rt. Hon. The Lord Mance,  
Chief Justice, AIFC Court

Representation:

The Claimant was represented by Mr. Michael Wilson, Partner, Michael Wilson & Partners, Ltd, Almaty, Kazakhstan.

The Defendant 1 was not represented.

The Defendant 2 was represented by Mr. Bakhyt Tukulov, Partner, Tukulov & Kassilgov Litigation LLP, Almaty, Kazakhstan.

The Defendant 3 was represented by Ms. Dinara Nurgazy, Partner, Kinstellar LLP, Almaty, Kazakhstan.

**IN THE COURT OF FIRST INSTANCE  
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE**

**26 September 2023**

**CASE No: AIFC-C/CFI/2023/0002**

**MICHAEL WILSON & PARTNERS, LIMITED**

**Claimant**

**v**

**(1) CJSC KAZSUBTON and (2) KAZPHOSPHATE LLP,  
(3) KAZPHOSPHATE LIMITED**

**Defendants**

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**JUDGMENT**

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**Chief Justice of the Court**

**The Rt. Hon. The Lord Mance**

## JUDGMENT

### *Introduction*

1. In this case, the Claimant seeks an order from the AIFC Court enforcing:
  - a. judgments given by the English High Court against the First and Second Respondents (respectively, CJSC KAZSUBTON and Kazphosphate LLP) on, respectively, 12 May and 4 August 2004 (as restated and amended on 21 August 2013) in the principal amount of £111,401.70 together with interest; and/or
  - b. judgments given by a Netherlands Court on 22 October and 6 November 2013, recognizing and granting permission to enforce these English judgments under Article 38 of the Brussels I Regulation on the Enforcement of Judgments in Civil and Commercial Matters.
2. The two judgments relate to unpaid fees for legal services said to have been rendered to the First and Second Respondents by the Claimant, Michael Wilson and Partners, Limited, a British Virgin Island company, represented before the AIFC Court by Mr Michael Wilson himself.
3. The case was begun in the AIFC Court by a standard Claim/Application Form. Filed with the Court on 23 December 2022, this was, in accordance with Rule 4 of the Court's Rules, stamped and formally issued by the Court on 10 February 2023. In it the First and Second Respondents, both Kazakh companies, are named as "Respondents/Defendants/Judgment Debtors" and a third company, Kazphosphate Limited ("KPL"), an English company, is named as "Respondent/Third Party". The case was the subject of an oral hearing on the documents held in Astana on 17 May 2023, when the Court was addressed by representatives of the Claimant, the Second Respondent and KPL (but not the First Respondent): see further paragraphs 14 and 15 below.
4. The nature of KPL's alleged involvement was not further explained in the Claim Form; but in Outline Submissions dated 10 March 2023, the Claimant submits that:
  - a. KPL is "the sole participant in and of [the Second Respondent] as a matter of law and fact", and submits that "by Kazakh law as the sole participant and ultimate management body of [the Second Respondent], KPL is an integral part of the same"; and, further, that
  - b. KPL is a debtor owing monies to the Second Respondent within Kazakhstan, an asset against which the Claimant "is entitled to enforce as and when its application for reciprocal recognition and permission to enforce is granted".

Further, in written submissions dated 11 May 2023 submitted by the Claimant in advance of the hearing on 17 May 2023, the Claimant stated:

- c. “In addition [the Claimant] has a third-party debt order against both of the Respondents and also the Third-Party Debtor, which has been in full force and effect since 07.05.19 to date, and by which they are bound, and pursuant to which all of the debts and receivables owed by the Third-Party Debtor to [the Second Respondent] are frozen and arrested in aid of the enforcement of [the Claimant’s] judgment debts.”
5. The standard Claim Form carries a note that, when used, it “should state the law which the Claimant/Appellant maintains governs the dispute; and the provision of the law which the Claimant/Appellant maintains gives rise to the jurisdiction of the Court in respect of their application”; and, further, under the heading *Brief Details of Application*, that it should state the “Basis on which it is alleged that the Court has jurisdiction”. These are, under AIFC Court Rule 4.22, requirements for all Claim Forms.
6. What the Claim Form as completed actually said was:

“GROUND FOR REQUEST

6.MWP requests the Court to grant reciprocal recognition of the judgments and permission for their enforcement in the AIFC Court in accordance with Article 13 of the Constitutional Statute of the Republic of Kazakhstan on the Astana International Financial Centre No 438-V of 7 December 2015 (with amendment as of 30 December 2019, which commence on 11 January 2020)”

7. The Claim Form was put before me as Chief Justice, and the Registrar at my request wrote as follows to the Claimant by email on 15 February 2023, copied to all named Respondents:

“The ground of jurisdiction invoked in support of this application is Article 13 of the Constitutional Statute (repeated in Regulation 26(1) of the Court Regulations). Article 13 and Regulation 26(1) confer on the AIFC Court various different heads of jurisdiction, which arise on different factual hypotheses.

The application form does not identify which of these heads is said to apply or on what factual basis.

The application form therefore appears to the Court to fail to comply with the Notes for Claim attached to it, which require it to state “the provision of the law which the Claimant maintains gives rise to the jurisdiction of the Court in respect of their application” and the “Basis on which it is alleged that the Court has jurisdiction”.

The Court requires the Claimant to address these points by response which should be filed at the Court by reply to this email by **6pm Astana time on Monday 27 February 2023.**”

8. The period stated in this request was later extended to 10 March 2023. On that date the Claimant filed the Outline Submissions already referred to. In these, it submitted that its application for recognition and permission to enforce was not “a ‘claim’ *per se*”, but was a simple application, the inference being that it was unnecessary and inappropriate to require it to be brought within any particular head of Article 13 of the Constitutional Statute or of Regulation 26(1). The Court’s email direction of 15 February 2023 was on this basis said to be misconceived.

*Submission to the jurisdiction*

9. In the Outline Submissions, the Claimant also alleged that both the Second Respondent and KPL had filed unconditional acknowledgements of appearance and so submitted to the AIFC Court’s jurisdiction.

10. The position in the latter respect is as follows.

- a. The issue by the Court of the Claim Form on 10 February 2023 was communicated by the Court by an email of the same date saying:

“The Defendants shall file a defense to the claim by reply to this email by **6pm Astana time on Friday 10 March 2023**”.

- b. KPL filed an acknowledgement of service on 24 February 2023 and the Second Respondent filed one on 7 March 2023, in each case stating that jurisdiction would be disputed.
- c. At 3.09 p.m. on 9 March 2023 KPL filed an application for an order that the AIFC Court had no jurisdiction to try the claim against KPL, relying upon (a) the absence of any claim articulated against KPL, (b) the definition of the Court’s jurisdiction in the Constitutional Statute and Court Regulations and (c) the Claimant’s failure to state in the claim form the basis of the Court’s jurisdiction.
- d. At 4.40 p.m. on 9 March 2023 the Court extended the time for any steps by all the Respondents, including, expressly, the time for compliance with Parts 7 and 8 of the Rules, “until 14 days after the Claimant has amended its Application Form to comply with the requirements identified in the Court’s email dated 15 February 2023 or until further order”.
- e. On 10 March 2023 the Claimant filed the Outline Submissions already referred to.
- f. On 16 March 2023 the Second Respondent applied for an order that the Court does not have jurisdiction.

- g. On 23 March 2023 KPL filed an amended application, referring to the Claimant's Outline Submissions dated 10 March 2023 and expanding upon its previous application.
  - h. The First Respondent has not filed an acknowledgement of service or defence, or taken any other step in the proceedings.
11. On 30 March 2023 the Court issued Directions, which were amended on 10 April 2023, to the effect that it would, as a first step, determine the issue of jurisdiction, and that this would include
- “determining:
- a. whether a claim form within the meaning of Parts 7 and 8 of the Court's Rules is required;
  - b. whether it is necessary to invoke any head of jurisdiction specified in Article 13 of the Constitutional Statute or in AIFC Court Regulation 26(1);
  - c. whether any connections with Kazakhstan of some or all of the Defendants, of the nature alleged by the Defendants, are or may be relevant, if established to exist, to the existence of any jurisdiction on the part of the Court; this would not involve considering at this stage whether such connections actually exist;
  - d. whether the Second and/or Third Defendant has or have in any event submitted to the jurisdiction of the AIFC Court in respect of the Plaintiff's application for recognition and enforcement of the alleged judgments;
  - e. whether in the light of the answers to these questions, the Plaintiff's application for recognition and enforcement should be granted or be permitted to continue or should be struck out or dismissed.”
12. The Court added that all these questions appeared capable of being determined without going into any issues on which further evidence, beyond that already before the Court, would be necessary; however, if any party took a different view, it was at liberty to identify, within 14 days, the nature of the further evidence on which it sought to rely, and the Court would then consider to what extent such further evidence was necessary, or whether its above Directions needed in any way modifying.
13. On 24 April 2023 the Second Respondent issued applications for an order that the Claimant pay the costs of USD 6,600 allegedly incurred up to that date in relation to the proceedings and also provide security for the Second Respondent's costs, in the amount of USD 10,000 in the form of a first-class international bank's irrevocable guarantee.
14. Pursuant to the Court's Directions dated 30 March 2023, the issue of jurisdiction was on 5 May 2023 listed to come, and duly came, before the Court for submissions on Wednesday 17 May 2023 and subsequent determination. In circumstances where the hearing has already taken place and the substantive issues been fully argued, and where the costs have been, largely (if not entirely) already incurred, the Court

considers that it should determine the case on the substance, addressing costs once it has done so, rather than make any interlocutory order, whether for security or outright, regarding costs.

15. The Court was provided for the purposes of the hearing with a bundle containing the full procedural documentation, including also skeleton submissions lodged by Claimant and Second Respondent; and was addressed orally by Mr Michael Wilson for the Claimant, by Mr Bakhyt Tukulov for the Second Respondent and by Mr Mukhit Yeleuov for KPL. The First Respondent did not appear.
16. The position regarding the First Respondent, which has not appeared or taken any step in the proceedings, is clear. The Court will have, of its own motion, to consider the obvious jurisdictional issue which arises in the proceedings, and make whatever order proves appropriate in relation to that Respondent.
17. As to the Second Respondent and KPL, the Court will start by considering whether they or either of them can and should be held to have voluntarily submitted to the Court's jurisdiction. Implicit in the Claimant's submission that they had done so is the further submission that this would enable the Court to give a judgment recognizing and giving permission to enforce the English and Dutch judgments in circumstances where this would otherwise be beyond the Court's jurisdiction under the Constitutional Statute and Regulations. The Court need not examine that proposition, because it is satisfied that both the Second Respondent's and KPL's jurisdictional challenges can and should be entertained and determined by the Court.
18. So far as concerns KPL, even on the strictest application of the letter of the Rules without regard to any other matter, KPL filed its acknowledgement of service on 24 February 2023 within the 28 days allowed it under Rule 7.4(2) as an English company on which the claim form was served out of the Republic of Kazakhstan. It indicated in accordance with Rule 8.2 that it intended to dispute jurisdiction. It followed this up with its application disputing jurisdiction dated 9 March 2023, within the 14 day period prescribed by Rule 8.4(1).
19. So far as concerns the Second Respondent, its acknowledgement of service dated 24 February 2023 appears, since it is a Kazakh company, to have been outside the 14 day period prescribed by Rule 7.4(1). It followed this up with an application challenging jurisdiction on 16 March 2023, within the 14 days prescribed by Rule 8.4(1).
20. In parenthesis, it is unfortunate that the Court's own direction, when communicating the issue of the Claim Form was that the Respondents should file a defense by 10 March 2023 – no reference being made to the Rules' requirement of an earlier acknowledgement of service. While the Rules remain in their



present form, the Court will in future need to refer, or refer also, to the requirement of an acknowledgement of service. Since the Second Respondent did actually serve such an acknowledgement, it is not clear that the Court's reference to filing a defense by 10 March 2023 misled or influenced it.

21. Much more material are:

- a. the Court's email of 15 February 2023, pointing out that the Claim or Application Form failed to comply with the Notes, requiring that it state "the provision of the law which the Claimant maintains gives rise to the jurisdiction of the Court in respect of their application" and the "Basis on which it is alleged that the Court has jurisdiction" and requiring a response by, initially, 27 February 2023 and then, by extension, 10 March 2023, when the response was actually given: see paragraphs 8 and 9 above; and
- b. the Court's extension on 9 March 2023 of the time for any steps by all the Respondents, including, expressly, the time for compliance with Parts 7 and 8 of the Rules, "until 14 days after the Claimant has amended its Application Form to comply with the requirements identified in the Court's email dated 15 February 2023 or until further order".

22. The requirements of Rule 4.22 of the AIFC Court Rules are categoric:

"All Claim Forms shall state:

- (1) The law which the Claimant maintains governs the dispute; and
- (2) The provision of the law which the Claimant maintains gives rise to the jurisdiction of the Court in respect of their claim."

It follows that the Claim Form was defective and susceptible to being struck out – at least, unless it could be corrected. On its face, it invoked Article 13 of the Constitutional Statute, but it failed to identify any relevant head in Article 13: see paragraphs 6 and 7 above. By invoking Article 13, it also failed to identify, and moreover contradicted, what has since become the Claimant's primary case, namely that the case need not and does not involve any "'claim' per se" falling within Article 13, but is, rather, a simple application to enforce a foreign judgment, upon a jurisdictional basis requiring no elaboration and/or implicit in Article 40(3) of the AIFC Court Regulations. In these circumstances and also in the light of the Court's email of 15 February 2023, it would be understandable for a respondent to defer any response to the proceedings, until their jurisdictional basis was explained. However, the Second Respondent did in fact file an acknowledgement of service on 24 February 2023, before the Claimant had made any response.

23. More conclusive, therefore, is the fact that the Court, on 9 March 2023, expressly extended all Respondents' time for compliance with Parts 7 and 8. That, in the Court's view, operated as a general extension, with retrospective as well as prospective effect, even in respect of steps which the Second Respondent had already taken. Even if the Second Respondent was otherwise technically late in filing its acknowledgement of service, its time for doing so was extended retrospectively, so that its acknowledgement was in time.
24. In any event, and viewing the position at a still more general level, the Rules are not to be applied as a straightjacket, but in accordance with the overriding objective of dealing with cases justly (Rule 1.6) and, where necessary, by the court waiving "any procedural requirement if it is satisfied that it is in accordance with the overriding objective to do so" (Rule 1.8). Here, there was a Claim Form which was, at least on its face, defective in a respect which the Court itself had by its email of 15 February 2023 required to be rectified. Irrespective of the Court's extension of time on 9 March 2023, no possible detriment to the Claimant has been shown arising from any delay by any Respondent in taking any procedural step. The Court has no hesitation in concluding that, if and so far as there was, or may have been, any failure to comply with the letter of the Rules, the Court should waive that requirement, so as to enable the Second Respondent and KHL to pursue their jurisdictional challenges to the claim.

*The AIFC Court's constitutional jurisdiction*

25. The core issue in this case is whether it is possible in the AIFC Court to apply for and obtain recognition of and permission to enforce an English or Dutch judgment without bringing the circumstances within, or issuing a Claim Form identifying, any head of jurisdiction stated in Article 13 of the Constitutional Statute or Regulation 26(1).
26. Before getting to that core issue, the Court proposes, however, to direct a word to the unusual position of KPL. KPL is not identified in the Claim Form as a judgment debtor, but as a third-party debtor, by which the Court understands the Claimant to allege that KPL owes a debt to the First and/or Second Respondent, in respect of which the Claimant is entitled to, and has obtained, some form of third party debt order in the United Kingdom, and might be entitled to obtain such an order in Kazakhstan, if jurisdiction over all relevant entities could be properly established. In so far as the Claimant's case in this respect has been developed to any extent, it is as set out in paragraph 4a, b and c above.
27. Leaving aside for the moment the core jurisdictional issue, the Claimant has not in the Court's view made good any basis for seeking to join KPL in the present claim. This is for a number of reasons:

- a. First, the English and Dutch judgments are the only judgments in respect of which recognition and enforcement has been sought by the Claim Form, and they are not against KPL.
- b. Second, if, in some way, KPL is said to be assimilated with the Second Respondent, the time and place to allege and prove that was in England in the proceedings there, assuming that KPL could be joined as a co-defendant (e.g. as a necessary or proper party). Judgment could then, if otherwise appropriate, have been entered there against KPL (as well as, or in addition to, the Second Respondent) and would no doubt later have been recognized in the Netherlands under the Brussels 1 regime.
- c. Third, to obtain an English or (under the Brussels 1 regime a Netherlands) judgment against the Second Respondent, and then seek to join to an application for recognition and enforcement an application for judgment against another legal entity is, in contrast, self-evidently impossible. Recognition and enforcement involve just that – recognition and enforcement - in relation to a foreign judgment, not its expansion or amendment to embrace a different legal entity.
- d. Fourth, the Claim Form issued 10 February 2023 makes no claim or application to enforce the third party debt order, to which the Claimant subsequently referred in its written submissions dated 11 May 2023 (see paragraph 4c above).
- e. Fifth, even if there had been any such claim or application, documentation sent to the Court by the Claimant on 10 August 2023 shows that (i) the order dated 7 May 2019 was only an interim order freezing any debt due from KPL to the Second Respondent, (ii) that it led to a (complex) Unless Order dated 9 December 2021, under which KPL was to be debarred from defending, and the Claimant was to have “liberty to apply for and be granted a final TPDO [i.e. Third Party Debt Order]”, unless KPL met certain requirements, which however the Unless Order expressly contemplated that KPL would be likely to, and would subject to certain conditions be at liberty to, apply to vary, (iii) that further directions orders dated 9 December 2021 and 4 August 2023, also among the documentation sent to the Court on 10 August 2023, indicate that this is what in fact happened and that whether or not there should be any Final Third Party Debt Order is the subject of `ongoing litigation in England and that (iv) in short, there has even to date been no Final Third Party Debt Order giving rise to an obligation on KPL’s part to pay any sum to the Claimant, which could be the subject of a claim or application for recognition and enforcement.
- f. Sixth, the consideration that, if the Claimant were able to enforce the English and/or Netherlands judgments in the AIFC Court, it might then seek, or on some ground be able to obtain third party debt order against KPL, is no basis for joining KPL to the present proceedings for recognition and enforcement.
- g. The Court would therefore have held that, whatever the merits of the core jurisdictional issue, the proceedings as against KPL are irregular and inadmissible. The Court only adds that, had the case against KPL not fallen to be dismissed on these grounds, it would have raised, and failed by reason

of, the like constitutional objection to that discussed and identified in what follows in relation to the First and Second Respondents.

28. The Court turns to the core jurisdictional issue with regard to the First and Second Respondents. Is the Claimant's application for recognition and permission to enforce the English and Dutch judgments a claim which the Claimant has brought within a head of jurisdiction set out in Article 13 of the Constitutional Statute and AIFC Court Regulation 26(1)? Is it a claim which under the Rules requires a Claim Form identifying any such head of jurisdiction? The Second Respondent and KPL submit that it is a claim requiring such a Claim Form and that the case does not fall within any existing head of the Court's jurisdiction. The Court's jurisdiction is, on their case, specifically confined.
29. The Claimant submits that it is not a claim in the sense of the Rules, but is rather a simple application, of a type which, it submits, leads in other systems speedily and without formality to recognition and enforcement in other systems. The issue of the Claim Form was, in effect, simply to start the process of recognition and enforcement. There was no need to look within the Constitutional Statute or Court Regulations for a jurisdictional basis for a simple application of this sort. The AIFC Court would, it submits, be failing in its rationale if it did not have and offer such a mechanism, and the Constitutional Statute and Regulations, read together, do, in its submission, expressly contemplate such a mechanism.
30. It is necessary at this point to set out relevant parts of the Constitutional Statute and Regulations. The Statute contains provisions as follows:

**"Article 13. AIFC Court**

1. The judicial settlement of disputes specified by paragraph 4 of this article is to be undertaken exclusively by the AIFC Court. The purpose of the Court is to protect the rights, freedoms and legal interests of the parties and to ensure that the Acting Law of the AIFC is implemented.
4. The AIFC Court has exclusive jurisdiction in relation to the hearing and adjudication of the following disputes, but does not have jurisdiction in criminal and administrative proceedings:
  - 1) disputes between AIFC Participants, AIFC Participants and AIFC Bodies and an AIFC Participant or AIFC Body and its expatriate Employees;
  - 2) disputes relating to activities conducted in the AIFC and governed by the Acting Law of the AIFC;
  - 3) disputes transferred to the AIFC Court by agreement of the parties.
5. The activities of the AIFC Court are governed by the resolution of the Council *On the Court of Astana International Financial Centre*, which is based on the principles and legislation of the law of England and Wales and the standards of leading global financial centers. The Resolution of the Council on the Court of Astana International Financial Centre determines the composition of the AIFC Court, the procedure for the appointment and removal of court officials, qualification requirements for judges and court officials, and other matters related to the functioning of the AIFC Court

6. ....
7. Decisions of AIFC Court of Appeal are final and not subject to appeal, and are binding on all natural and legal persons.
8. Decisions of the AIFC Court are to be enforced in the Republic of Kazakhstan in the same way, and on the same terms, as judicial acts of the courts of the Republic of Kazakhstan. To enforce a decision of the AIFC Court, a translation of the decision into the Kazakh or Russian language, in accordance with the procedure determined by AIFC Acts, is required.
9. Decisions of the courts of the Republic of Kazakhstan are to be enforced in the territory of the AIFC in accordance with legislation of the Republic of Kazakhstan.
10. The AIFC Court has exclusive jurisdiction to interpret AIFC Acts.

#### **Article 14. International Arbitration Centre**

1. The International Arbitration Centre hears disputes on the basis of an arbitration agreement between the parties.
  2. The International Arbitration Centre is established and acts in accordance with the resolution of the Council On the International Arbitration Centre.
  3. Awards of the International Arbitration Centre are to be recognized and enforced in the Republic of Kazakhstan in the same way, and on the same terms as, arbitration awards issued by arbitration institutions in the Republic of Kazakhstan. To enforce an award of the International Arbitration Centre, a translation of the award into the Kazakh or Russian language, in accordance with the procedure determined by AIFC Acts is required.
  4. Awards of arbitration courts in the Republic of Kazakhstan are to be recognized and enforced in the territory of the AIFC in accordance with legislation of the Republic of Kazakhstan.”
31. The AIFC Court Regulations reflect these provisions in wording which is not suggested to differ significantly in effect. They provide:

#### **“PART 5: JURISDICTION OF THE COURT**

##### **26. Jurisdiction of the Court**

- (1) The Court has exclusive jurisdiction, as provided by Article 13 of the AIFC Constitutional Statute, in relation to:
  - (a) any disputes arising between the AIFC’s Participants, Bodies, and/or their foreign employees;
  - (b) any disputes relating to operations carried out in the AIFC and regulated by the law of the AIFC;
  - (c) any disputes transferred to the Court by agreement of the parties; and
  - (d) the interpretation of AIFC Acts.
- (2) The reference to “disputes” between the parties mentioned in this Article applies to civil or commercial disputes arising from transactions, contracts, arrangements or incidences.

- (3) The reference to “transferred to the Court by agreement of the parties” in this Article applies to all parties, including parties not registered in the AIFC, such that all parties may “opt in” to the jurisdiction of the Court by agreeing to give the Court jurisdiction pre- or post-dispute.
- (4) The Court does not have jurisdiction in relation to any disputes that are of a criminal or administrative nature.
- (5) The Court of First Instance has jurisdiction to hear and determine an appeal from the decision of an AIFC Body, Organization, or Participant, as provided for in the AIFC Constitutional Statute, AIFC Regulations, AIFC Court Rules, or other AIFC Rules where the appeal relates to:
  - (a) a question of law;
  - (b) an allegation of a miscarriage of justice;
  - (c) an issue of procedural fairness; or
  - (d) a matter provided for in or under AIFC law.Decisions of the Court of First Instance referred to in this Article 26(5) are final and shall not be subject to further appeal.”

32. The Regulations go on to provide:

**“40. Enforcement**

- (1) Judgments, orders and directions of the Court, and arbitration awards ratified by the Court, may be enforced within the AIFC in accordance with any execution order issued by the Court.
- (2) Judgments, orders and directions of the Court, and awards issued in arbitrations seated in the AIFC which have been ratified by the Court, may be enforced in the AIFC and the Republic of Kazakhstan in accordance with the AIFC Constitutional Statute.
- (3) The Court may issue rules or practice directions for the further enforcement of other judgments and arbitration awards.”

33. The AIFC Arbitration Regulations dated 5 December 2017, stated to be adopted under Article 14 of the Constitutional Statute, contain further provisions as follows:

**“PART 3: RECOGNITION AND ENFORCEMENT OF AWARDS**

**45. Recognition and enforcement of awards**

- (1) An arbitral award, irrespective of the State or jurisdiction in which it was made, shall be recognized as binding within the AIFC and, upon application in writing to the AIFC Court, shall be enforced within the AIFC subject to the provisions of this Article and of Articles 46 and 47. For the avoidance of doubt, where the Republic of Kazakhstan has entered into an applicable treaty for the mutual enforcement of judgments, orders or awards, the AIFC Court shall comply with the terms of such treaty.
- (2) The party relying on an award or applying for its enforcement shall supply the original award or duly certified copy and the original arbitration agreement referred to in Article 15 or a duly certified copy. If the award or the agreement is not made in English, the AIFC Court may request the party to supply a duly certified translation.  
.....”

34. The starting point for a proper understanding of the law governing and jurisdiction of the AIFC is the Constitutional Statute. The Court and Arbitration Regulations are subsidiary law, made under the Constitutional Statute – specifically, in the case of the Court Regulations, under Article 13(5) of that Statute and, in the case of the Arbitration Regulations, under Article 14 of that Statute. It may in some contexts perhaps be legitimate to interpret the Constitutional Statute in the light of the Regulations, particularly in

so far as the Constitutional Statute was amended on two occasions (22 December 2017 and 9 January 2018) very shortly after the Regulations were enacted on 5 December 2017. There may perhaps also be a certain flexibility in Article 13(5), which is the express basis of the Court Regulations. How far this may be so in either case was not argued before me, and I express no view on it. It was not suggested that it could be relevant in the present case.

35. The jurisdiction provided by Articles 13 and 14 of the Constitutional Statute and given concrete effect by the Court and Arbitration Regulations is, on its face, a specific and carefully expressed and strictly delimited jurisdiction, albeit that it is for the most part exclusive where conferred (that is exclusive in all cases under Article 13).
36. It is noticeable in this connection that Articles 13(9) and (10) of the Constitutional Statute contain mutual provisions for the recognition and enforcement of decisions of (a) the AIFC Court in the Republic of Kazakhstan and (b) the Courts of the Republic in the AIFC. The Constitutional Statute says nothing more about recognition and enforcement of court decisions. It says nothing to confer or suggest any jurisdiction to recognize or enforce decisions of courts of jurisdictions outside Kazakhstan.
37. Article 14, relating to the International Arbitration Centre (“IAC”) is also limited in scope. It provides for (i) recognition and enforcement in the Republic of IAC awards in the same way as awards of arbitral institutions in the Republic and (ii) recognition and enforcement in the AIFC of awards made by arbitration courts [sic] in the Republic.
38. These constitutional provisions are addressed in some detail in AIFC Court and AIFC Arbitration Regulations, which were not the subject of close analysis before me. AIFC Court Regulation 40(1) only provides for enforcement “within the AIFC” of AIFC Court judgments, orders and directions as well as of arbitration awards ratified by the AIFC Court. Regulation 40(2) goes further, by providing for enforcement “in the AIFC and the Republic of Kazakhstan in accordance with the Constitutional Statute” of both AIFC judgments, orders or directions and “awards issued in arbitrations seated in the AIFC which have been ratified by the Court”. This is not the case in which to seek to explore what precisely may be comprised in this context by the concept of recognition or enforcement “within” or “in” the AIFC. But the reference to the Constitutional Statute must be to or at least include Article 13(8) of that Statute, as regards AIFC Court decisions, and article 14(3) and possibly (2) of the Statute, as regards IAC awards. The careful restriction of AIFC Court Regulation 40(2) (addressing enforcement in both the AIFC and the Republic) to awards “in arbitrations seated in the AIFC” contrasts with the wider provision in AIFC Arbitration Regulation 45(1) for recognition and enforcement “within the AIFC” of “any arbitral award, irrespective of the State or

jurisdiction in which it was made”. Again, it is unnecessary to consider what precisely may be comprised by “within the AIFC”. But the difference in treatment of IAC awards and foreign awards is clear.

39. The drafters were therefore careful in these provisions to distinguish between judgments and awards emanating within and outside Kazakhstan. AIFC Court judgments are enforceable without more in both the AIFC and the Republic, just as judgments of the ordinary Kazakh court are enforceable in Kazakhstan and the AIFC. Arbitration awards are enforceable in the AIFC *and* the Republic if the arbitration was seated in the AIFC and the award has been ratified by the AIFC Court. But in other cases arbitration awards are only enforceable “within the AIFC”. It is also very noticeable here that there are no provisions relating to the enforcement, either in the AIFC Court and still less in the Republic, of judgments from outside Kazakhstan.
40. Nothing in the Constitutional Statute or in the Court or Arbitration Regulations addresses expressly the recognition or enforcement of foreign court judgments, in the absence of any relevant treaty. There is no parallel to Arbitration Regulation 45(1) which covers foreign awards expressly, by the words “irrespective of the State or jurisdiction in which it was made”. There is however in Article 45(1) of the AIFC Arbitration Regulations the second sentence providing that:

“For the avoidance of doubt, where the Republic of Kazakhstan has entered into an applicable treaty for the mutual enforcement of judgments, orders or awards, the AIFC Court shall comply with the terms of such treaty.”

Viewed in context, this sentence may well only refer to any treaty, such as the New York Convention, relating to arbitration or the enforcement of arbitration awards, whether or not converted into court judgments in the relevant foreign jurisdiction. In other words, it is a qualification on the operation of the first sentence of Regulation 45(1). It would seem incongruous, with its wording and context, to treat it as a self-standing provision relating to enforcement of foreign judgments. Be that as it may be, there is no suggestion in the present case of any relevant treaty under which the English and Netherlands judgments are or could be sought to be enforced. It is unnecessary to consider what would be the position in the AIFC Court if there were a relevant treaty between the United Kingdom or the Netherlands and the Republic of Kazakhstan, providing for the reciprocal recognition and enforcement of judgments. If and when such a question ever arose, it would no doubt be necessary to pay close attention to the provisions regarding the Acting Law of the AIFC, set out in Article 4 of the Constitutional Statute.

41. The Claimant relies, however, on Court Regulation 40(3) as indicating that the AIFC Court has jurisdiction to recognize foreign court judgments in the absence of any treaty. That provision says (as set out in paragraph 31 above) that “The Court may issue rules or practice directions for the further enforcement of other judgments and arbitration awards.” No such rules or practice directions have been made. But the



Claimant submits that they could or should have been; that the provision at the very least indicates that the AIFC Court must have jurisdiction to recognize and enforce foreign judgments; and that the Court should give reality to this jurisdiction by shaping its procedures to do so now.

42. There may be situations where the Court can and should find a way of filling an obvious lacuna in the rules or practice directions. The Court is satisfied that the present is not such a situation. The language of Regulation 40(3) indicates a clear intention by the AIFC Management Council, acting under Article 10 of the Constitutional Statute, not to make any provision for “the further enforcement of other judgments and arbitration awards”, but to permit the Court to do so by a future rule or practice direction. Under Court Regulation 30(1), any such rule or practice direction would fall to be made by the Chief Justice, no doubt after careful consideration. No such rule or practice direction has been decided upon or made, and no basis is apparent upon which the Court could by a judgment in particular case alter or replace what must, as stated, be viewed as a clear decision by the Chief Justice not to make any such provision.
43. Still more fundamentally, the difficulty about treating Regulation 40(3) as contemplating the recognition or enforcement of foreign judgments, without more, is that no jurisdictional basis is stated or appears in the Constitutional Statute and Regulations for a provision of that scope. The provision should not be construed as having a scope which is not constitutionally authorized and would, logically, mean that it was to that extent invalid.
44. The Claimant asks rhetorically: what else can Court Regulation 40(3) mean? The first answer to this is, in the Court’s view, that there are situations in which rules or practice directions “for the further enforcement of other judgments and arbitration awards” could be necessary or appropriate. Take, for example, the provision in Article 13(9) of the Constitutional Statute for enforcement of decisions of the ordinary Kazakh Courts in the AIFC in accordance with legislation of the Republic. It might well be thought that AIFC rules and practice directions were necessary or appropriate to enable that to happen or happen smoothly.
45. Alternatively, take the situation where there was, despite the AIFC Court’s “exclusive” jurisdiction and perhaps even without objection, litigation abroad between AIFC Participants or Bodies or their employees or relating to AIFC activities, leading to a judgment which one party wished to have recognized or enforced by the AIFC Court. The claim could then fall directly within the heads of jurisdiction in Article 13. Rules and practice directions could be thought appropriate to cover that situation, even if it might be regard as remote.

46. No suggestion is made, however, that the present proceedings are justified on the basis that they fall within any of the heads of jurisdiction contained in Article 13 or 14 of the Constitutional Statute and Court Regulations 26 and 30.
47. Ultimately, therefore, the Claimant faces the problem that the jurisdiction of the AIFC Court is a special, and carefully delimited jurisdiction. The AIFC Court is not a court of general, let alone inherent, jurisdiction. The second answer to the Claimant's rhetorical question about Court Regulation 40(3) is, therefore, that, even if Regulation 40(3) were to be seen as beating the air, that cannot create a jurisdiction which does not exist, and for which there is no basis, in the Constitutional Statute and Regulations.
48. The Claimant submits that the recognition and enforcement of foreign judgments is a standard feature of any modern commercial court, and that, without such a procedure, the AIFC Court will be failing in its function and in what was expected of it. But no court or tribunal created by statute can ignore the jurisdictional limits with which it was created.
49. References to procedures which arise under Bilateral Investment Treaty arbitrations, which normally have the backing of the New York or ICSID Convention when it comes to enforcement, do not assist. Nor does it assist to refer to summary procedures for the recognition and enforcement of foreign judgments which have been created by treaty and specific legislation (such as the UK's Foreign Judgments (Reciprocal Enforcement) Act 1933) or by regulation (such as the Brussels 1 Regulation between EU member states). The Claimant's submissions in this respect over-look the fact that, at common law, a foreign judgment by an internationally competent court is treated as creating an obligation on which the judgment creditor can sue: see e.g. Dicey, Morris & Collins, *The Conflict of Laws* (16<sup>th</sup> ed) paragraphs 14-007 et seq. But, for this purpose as for any other personal action, it is still necessary to establish jurisdiction over the judgment debtor in the jurisdiction in which the obligation is sought to be enforced: see e.g. Dicey, Morris & Collins, Chapter 11, paragraphs 11R-001 et seq.
50. References to the position in other international commercial courts are equally unavailing, unless account is taken of their respective and differing powers. In relation to the general power to recognize and enforce foreign judgments which the Dubai International Financial Centre ("DIFC") Court is said to enjoy, it is, for example, relevant to consider the express provisions of the Dubai Law No 12 of 2004 on Judicial Authority (and Articles 5(A)(1)(d) and 7(4) in particular) and of Articles 19(1)(d) and 24(1)(a) of the DIFC Court Law No 10 of 2004 made thereunder.
51. The Claimant does not make good its submission that the AIFC Court was created with recognition and enforcement of the type now sought specifically in mind. The opposite seems likely to be correct, in view

of the careful delimitation by the Constitutional Statute and by the AIFC Court and AIFC Arbitration Regulations of the circumstances in which judgments and awards can be recognized and enforced.

52. The Claimant's case is that the AIFC Court can and should, almost automatically, recognize and give permission to enforce any foreign judgment by an internationally competent court, thereby rendering that judgment enforceable as an AIFC Court judgment not only within the AIFC, but also throughout the Republic of Kazakhstan, under AIFC Court Regulation 40(2). That would have the direct effect of side-stepping any provisions of ordinary Kazakh law regarding recognition and enforcement of foreign judgments. That is also the desired effect of the present proceedings. The Claimant has already attempted to enforce the English and Dutch judgments in the ordinary courts of Kazakhstan. The attempt was rejected by Ruling of the Special Inter-District Economic Court of Almaty date 17 May 2006, upheld on appeal by Resolution of the Almaty City Court's Panel for Civil Cases dated 5 July 2006. The rejection was on the ground, it appears, that there was no relevant treaty or law providing for or enabling such recognition or enforcement in Kazakhstan. Article 501 of the Civil Code of Kazakhstan provides for recognition and enforcement of foreign judgments and awards by the ordinary Courts, but only under conditions and procedures determined by law or by international treaty ratified by the Republic. While the AIFC Court does not accept that this Ruling has a *res judicata* effect in the AIFC Court, it illustrates the remarkable effect which the Claimant's case would, if accepted, have in enabling the Claimant indirectly to enforce in the Republic of Kazakhstan a judgment, for the recognition and enforcement of which the ordinary law of Kazakhstan has been held not to provide.
53. Finally, the Court should say a word about the Claimant's submission that the present case involves an application, and does not involve any claim or dispute in relation to which any specific head of jurisdiction needs to be identified in the Constitutional Statute and/or Court Regulations. It follows from what the Court has already said that this submission fails. The AIFC Court has a specifically delimited jurisdiction, which is exhaustive as regards the heads stated in Article 13. Any proceedings begun in it must be begun completing a claim/application form identifying the head of jurisdiction relied upon in the Constitutional Statute. The Articles relevant in this context are primarily Articles 13 and/or 14 (read so far as necessary and appropriate with the AIFC Court and/or AIFC Arbitration Regulations). The possibility that in some cases Article 4 might also be relevant (see e.g., paragraph 40 above) need not here be further explored. Proceedings in the AIFC Court are started, as Rule 4.1 states, "when the Court issues a Claim Form at the Request of the Claimant". The proceedings clearly also involve a dispute, which the Claimant is seeking the AIFC Court's to resolve, if only because the Respondents and KPL have not met the English and Netherlands judgments and/or do not accept that these are susceptible of recognition and enforcement by or in the AIFC Court. Finally, there may of course be applications under the AIFC Court Rules in the course of properly brought proceedings, but that is a different matter.

54. For all these reasons, the Court will declare that it has no jurisdiction to entertain the present proceedings against any of the three Respondents and will (pursuant to Rule 8.8(1)) set aside the Claim Form and dismiss the proceedings as against all three of them accordingly.

55. Subject to any contrary representation, to be made in writing within 10 days of the date of this Decision, the costs of the Second Respondent and of KPL will be ordered to be paid by the Claimant. The Second Respondent and KPL may file information as to the amount of such costs, within 10 days of the date of this Decision, to which the Claimant may respond within a further 10 days after receipt of such information. The Court will thereafter fix the costs payable.

By Order of the Court,

The Rt. Hon. The Lord Mance,  
Chief Justice, AIFC Court

Representation:

The Claimant was represented by Mr. Michael Wilson, Partner, Michael Wilson & Partners, Ltd, Almaty, Kazakhstan.

The Defendant 1 was not represented.

The Defendant 2 was represented by Mr. Bakhyt Tukulov, Partner, Tukulov & Kassilgov Litigation LLP, Almaty, Kazakhstan.

The Defendant 3 was represented by:

1. Mr. Mukhit Yeleuov, Partner, Kinstellar LLP, Almaty, Kazakhstan.
2. Ms. Dina Berkaliyeva, Managing Associate, Kinstellar LLP, Almaty, Kazakhstan.



IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

18 January 2023

CASE No: AIFC-C/CFI/2023/0001

“ALAIGYR JOINT VENTURE” LLP

Claimant

v.

“BAUPROJEKT” LLP

Defendant

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JUDGMENT & ORDER

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Justice of the Court:

Justice Sir Rupert Jackson



## ORDER

**The application before the Court is dismissed.**

## JUDGMENT

1. This is an application for an anti-suit injunction. The background of this application is as follows.
2. On the 21<sup>st</sup> of October 2020 a Consortium comprising Temir Zat LLP, BauProjekt LLP, and MCI Group LLP, entered into a Contract with Alaigyr Joint Venture. The contract was on the turnkey basis for procurement of "Complex works for the development of design and estimate documentation for the "Project" stages, the development of design and estimate documentation for the "Detailed documentation" stages, the supply of equipment and the construction of an enrichment plant in infrastructure facilities, tailings storage facility, and water recycling system of the mining and processing plant for the extraction and processing of polymetallic ores at the Alaigyr deposit in the Karaganda region."
3. On the 12<sup>th</sup> of October 2021 Alaigyr Joint Venture entered into a separate contract with BauProjekt LLP for engineering services on design supervision as more precisely set out in Clause 1.1 of the contract relating again to the same project concerning the Alaigyr deposit. I only have this second contract, the 12<sup>th</sup> of October 2021 Contract, in Russian. It was supplied to the court today, but a member of the Court staff has translated for me passages which appear to be relevant.
4. The contract made in October 2020 is Contract No. 117 and I shall so refer to it. The contract made in October 2021 is Contract No. 1 and I shall so refer to it. Contract No. 117 contains an arbitration clause in Clause 1.14 of the Conditions in the following terms: "Any dispute, disagreement, controversy or claim, whether contractual or non-contractual, arising out of or in connection with this Contract, including any relating to its existence, validity, interpretation, performance, breach or termination, shall be submitted to and finally resolved by arbitration proceedings conducted by the International Arbitration Centre of the Astana International Financial Centre ("IAC"), in accordance with the IAC Arbitration and Mediation Rules in force on the date of submission of the Request for Arbitration to the Registrar of the IAC and forming an integral part of this clause."
5. Contract No. 1, however, does not contain an arbitration clause. Instead, in Clause 11.6, Contract No. 1 provides that: "All disputes between the Parties that arise in the process of implementing the terms of the Contract are resolved through negotiation; if there is no agreement reached within 15 calendar days the disputes of the Parties are resolved through a court in the Specialized Inter-District Economic Court of Karaganda Region."
6. During 2022 Alaigyr Joint Venture became dissatisfied with the services of the Consortium under Contract No. 117 and it became dissatisfied with the services of BauProjekt under Contract No. 1. Alaigyr Joint Venture served notices of termination under both contracts. The Consortium was aggrieved by the notice of termination which it believed to be unjustified.

7. Accordingly, the Consortium resorted to arbitration as it was fully entitled to do under Clause 1.14 of Contract No. 117. Ms. Burkovskaya, who has appeared before me today, drafted the Request for Arbitration which was served on behalf of the Consortium. I understand from Mr. Korobeinikov, who appears on behalf of Alaigyr Joint Venture today, that he received the Request for Arbitration on the 17<sup>th</sup> of September 2022. I understand from the Registrar that the Request for Arbitration was registered with the International Arbitration Centre on the 18<sup>th</sup> of November 2022.
8. Essentially, the Request for Arbitration was challenging the termination of the Contract No. 117 and maintaining that Alaigyr Joint Venture had no entitlement to terminate on the grounds which they asserted.
9. Meanwhile, BauProjekt was equally dissatisfied with the termination of Contract No. 1. Contract No. 1 as previously mentioned does not contain an arbitration clause. So, BauProjekt LLP commenced proceedings in accordance with the dispute resolution procedure in Clause 11.6 of Contract No. 1. BauProjekt commenced those proceedings as it was required to do before the Specialized Inter-District Economic Court of the Karaganda province, to which I shall refer as “the Karaganda Court”.
10. In its petition to the Karaganda Court BauProjekt headed the matter “Petition for invalidation of the notice of termination of the contract by customer unilaterally through fault of the contractor and to compel the Defendant to conclude the Contract”. The petition then sets out in some detail why BauProjekt contends that the termination of Contract No. 1 was wrongful. Those arguments span pages 1-4 and the first half of page 5 of the petition.
11. Finally, in the middle of page 5 and through page 6 we find a separate claim, the Claimant asking the Court to compel Alaigyr Joint Venture to conclude a contract for BauProjekt to supervise during construction. As I say, those proceedings were duly issued in the Karaganda Court.
12. I understand that they were issued on or about the 25<sup>th</sup> of November 2022. I am told by Ms. Burkovskaya that the Registrar of the Karaganda Court held a meeting with representatives of the Parties on the 29<sup>th</sup> of November 2022 and created a WhatsApp group so that the Parties could liaise with one another. That WhatsApp group included Ms. Anna Bobkova, who is Head of the legal department of Alaigyr Joint Venture. I am told, and I have no reason to doubt, that Ms. Bobkova asked where she could find the Claim Form on the 30<sup>th</sup> of November and she was directed to it through the medium of the WhatsApp group.
13. Having studied the petition of BauProjekt in the Karaganda proceedings, Ms. Bobkova launched an application to the Karaganda Court to dismiss the claim. I have this application in Russian at pages 227-228 of the Bundle and with an English translation at pages 225-226. This application is headed “Application to dismiss the claim”.
14. The gist of the case which Ms. Bobkova presented in her application was that the whole claim in the Karaganda Court should be dismissed because Contract No. 117 contained an arbitration clause. She argued that the whole claim in the Karaganda Court was an abuse of right which was prohibited by the Civil Procedure Code and therefore the whole dispute between BauProjekt and Alaigyr Joint Venture should go to arbitration.

15. The application which Ms. Bobkova launched on the 18<sup>th</sup> of November was an application which was doomed to fail. On any view, most of the matters in the petition of BauProjekt to the Karaganda Court could only be dealt with in court proceedings pursuant to Clause 11.6 of Contract No. 1, unless both parties agreed otherwise (which was not going to happen).
16. The Karaganda Court considered the matter. It held a hearing on the 11<sup>th</sup> of January and I understand that a further hearing is planned for the 24<sup>th</sup> of January. I do not imagine that the Karaganda Court will agree to dismiss the whole claim, because on any view most of the claim must proceed before that Court.
17. On the 30<sup>th</sup> of December 2022 Alaigyr Joint Venture issued an application in this Court, the AIFC Court, to obtain an injunction. In that application Alaigyr Joint Venture asked for the following relief. I quote from paragraph 1 of the application:

*"Alaigyr Joint Venture LLP (the claimant in the counterclaim in the pending IAC arbitration proceedings) ("Claimant") makes this urgent application today for the order on the interim injunction to restrain and/or prohibit one of the Respondents in the counterclaim in the pending IAC arbitration proceedings, BauProjekt LLP ("Defendant"), from continuing with proceedings in the Specialized Inter-District Economic Court of the Karaganda Region, which commenced on the 25<sup>th</sup> November 2022 ("Karaganda Proceedings"), in breach of an agreement between the Claimant and the Defendant that all disputes be referred to the International Arbitration Centre ("IAC") of the Astana International Financial Centre under Rules on Arbitration and Mediation at the IAC ("IAC Rules")."*

18. On any view, this application as it stands is doomed to fail because the major part of the proceedings before the Karaganda Court can only proceed in that Court. They are not subject to an arbitration clause. To make matters worse, the Claimant, Alaigyr Joint Venture, did not serve this application on the Defendant, BauProjekt LLP. I am sure that Alaigyr Joint Venture considered the matter conscientiously, but they came to the conclusion that it should be dealt with *ex parte*. Now, there are occasions when applications to the Court must be dealt with in the absence of the Defendant party. Sometimes that is necessary, for example because there is skulduggery suspected and it is designed to avoid documents being destroyed or assets being removed from the jurisdiction. On other occasions, time simply does not allow the Defendant to be notified. But in this case, the 30<sup>th</sup> of December was some 19 days ago. There was ample time to notify the Defendant of this application and for the Defendant to prepare itself to respond to it. There matters rested until a few days ago. The case was referred to me. I gave an instruction on Friday 13 January (as soon as I heard about this case) that the Defendant should be notified immediately. I understand that an email was sent from the Registry here to the lawyers for Alaigyr Joint Venture on Friday telling them to notify the Defendant, and then again on Sunday, but it seems that these two emails were not seen and acted upon until a third email was sent to the lawyers for Alaigyr Joint Venture later on Sunday.
19. The Claimant's lawyers notified the Defendant on Sunday of this week, three days ago, and the case papers reached the Defendants or the Defendant's lawyers yesterday, Tuesday, the 17<sup>th</sup> of January. Despite the lateness of the notification of these proceedings, Ms. Burkovskaya, counsel for the Defendant to this application, namely BauProjekt LLP, has attended the hearing today and has presented her arguments. I am most grateful to Ms. Burkovskaya for making herself available to assist the Court at such short notice.



20. So, the hearing was listed for today. The hearing began at 10am. Mr. Korobeinikov of Baker McKenzie Kazakhstan B.V. appeared at the hearing today for the Claimant, Alaigyr Joint Venture, and, as I say, Ms. Burkovskaya appeared for the Defendant to this application BauProjekt LLP. Both counsel have put their arguments before me very clearly, concisely, and moderately. I thank Mr. Korobeinikov for putting his case so clearly, and I thank Ms. Burkovskaya for putting her case so clearly. Matters were delayed somewhat during the hearing this morning when documents only available in Russian had to be translated for me by a member of the Court staff. But that went smoothly and no significant delay was caused.
21. Mr. Korobeinikov in his argument was forced at an early stage to retreat from the full application contained in writing before the Court and he essentially limited himself to arguing that if we look at the petition to the Karaganda Court, we will see on the last page and a half allegations concerning price of works and so forth which overlap with issues in the arbitration. Mr. Korobeinikov took me in some detail through the latter part of the petition by BauProjekt to the Karaganda Court, and then to the Request for Arbitration drafted by Ms. Burkovskaya and filed with the International Arbitration Centre here concerning the Consortium claims against Alaigyr Joint Venture. So, both counsel have made their submissions on this. Mr. Korobeinikov submits that there is an overlap between the arbitration and the court proceedings, and that steps must be taken to prevent that. He cannot argue that the whole Court proceedings should be stopped. At most, all he can reasonably seek is that there should be some injunction limiting the scope of the court proceedings. Ms. Burkovskaya says that there should be no such injunction. There is no overlap between court proceedings and arbitration proceedings. Matters should go forward as they currently stand.
22. In support of his application Mr. Korobeinikov cited two decisions of the UK Courts. The first decision which he relies upon is the "*Angelic Grace*", a decision of the Court of Appeal 1994 EWCA Civ J0517-10 and the second authority which he relies upon is the decision of the UK Supreme Court called *Ust-Kamenogorsk Hydropower Plant JSC v. AES Ust-Kamenogorsk Hydropower Plant* 2013 UKSC 35. I bear those decisions in mind. The general principles which they set out are applicable both in Kazakhstan and England. I note in particular what the Court of Appeal said in paragraph 68 of its Judgment of the *Angelic Grace*:
- "...where an injunction is sought to restrain a Party from proceeding in a foreign court in breach of an arbitration agreement governed by English Law, the English Court need feel no diffidence in granting the injunction, provided that it is sought promptly and before the foreign proceedings are too far advanced."*
23. In the present case, I do not think the application has been made promptly or before the Karaganda proceedings were too far advanced. All that was required was a simple application, on notice to the other side, to limit the scope of the court proceedings before the Karaganda Court. Instead what has happened is that a wide-ranging application to stop the entire Karaganda proceedings was launched on the 30<sup>th</sup> of December, over a month after the beginning of court proceedings and the Defendant was not notified of that application until mid-January. That seems to me to be a very unsatisfactory situation. In the meantime, with the Karaganda Court and BauProjekt being totally unaware of the application before this Court, the proceedings in the Karaganda Court went forward. There has been a hearing on the 11<sup>th</sup> of January. At that hearing the Judge and BauProjekt did not have in mind the proceedings before this Court, although of course they did have before them the doomed

application made by Ms. Bobkova to dismiss the Karaganda proceedings. So that is the first reason why I conclude that this application should fail.

24. The second reason why I conclude that this application should fail is that I am not persuaded that there is any substantial overlap between the arbitration proceedings and the court proceedings. There may be a small area of overlap. Both the arbitrator in the arbitration, and the Judge in the Karaganda proceedings will have to tread carefully to ensure that they do not, so to speak, tread on each other's toes. But I cannot fashion an order at this stage which will prevent any overlap arising. The problem which gives rise to the application before this Court is not the fault of either of the Parties before this Court. The problem arises because we have two different contracts with two different dispute resolution procedures, that is bound to generate difficulties and problems. I am sure that Ms. Burkovskaya, acting for BauProjekt, and Mr. Korobeinikov and his team at Baker McKenzie, acting for Alaigyr Joint Venture, will use their best endeavours to ensure that conflict between the two different processes, arbitration and litigation, are avoided altogether or failing that, are minimised.
25. But my decision on the application today is that the application must be dismissed.

By the Court,

Sir Rupert Jackson  
Justice, AIFC Court

Representation:

The Claimant was represented by:

1. Mr. Alexander Korobeinikov, Partner of Baker McKenzie, Almaty, Republic of Kazakhstan;
2. Ms. Yana Daloglu, Paralegal of Baker McKenzie, Almaty, Republic of Kazakhstan.

The Defendant was represented by:

1. Ms. Feruza Burkovskaya, Director of "URKO Company" law firm, Ust-Kamenogorsk, Republic of Kazakhstan.



IN THE COURT OF FIRST INSTANCE  
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

21 July 2023

CASE No: AIFC-C/CFI/2023/0031

CASE No: AIFC-C/CFI/2023/0032

PLS INVESTMENT CONSTRUCTION COMPANY LLP

Claimant

v

NAZARBAYEV BOLAT ABISHEVICH

Defendant

AND

PLS INVESTMENT CONSTRUCTION COMPANY LLP

Claimant

v

ALMATY HEAVY MACHINE PLANT JSC

Defendant

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JUDGMENT

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Chief Justice of the Court:  
The Rt. Hon. The Lord Mance

## JUDGMENT

1. These two cases have been commenced in the AIFC Court by agreement of the parties, pursuant to the Court's jurisdiction under Article 13.4(3) of the Constitutional Statute of Kazakhstan No 438-V ZRK of 7 December 2015, as amended, and Regulation 26(1)(c). (2), (9) and (10) of the AIFC Court Regulations dated 5 December 2017.
2. The Claimant in both cases is PLS Investment Construction Company LLP ("PLS Investment Co"), while the Defendants are Mr Bolat Nazarbayev in Case No 31 and Almaty Heavy Machinery Company ("AHM") in Case No 32. PLS Investment Co is a separate company from PLS-TM B. K. Isatai LLP ("PLS-TM"), which also features in the matter. The Court was told that they are companies which had different founders, but are now part of the same group.
3. Under Regulations 26(1) (c and (2) the Court's jurisdiction embraces cases where parties, including parties not registered in the AIFC, 'opt in' to the jurisdiction of the Court by agreeing to give the Court jurisdiction pre-or post-dispute. But Regulations 26(9) and (10) further provide:

“(9) Any issue whether a dispute falls within the jurisdiction of the Court shall be determined by the Court whose decision shall be final.

(10) The Court shall consider the express accord of the parties to a case that the Court shall have jurisdiction and if the Court considers it desirable or appropriate, it may decline jurisdiction or may refer any proceedings to another Court within the Republic of Kazakhstan.”
4. In these two cases, the question arises squarely for decision whether it is desirable or appropriate for the Court to exercise the jurisdiction otherwise conferred on it by the parties' express accord.
5. These cases have a large hinterland, going back to the era of privatization in the 1990s. On 18 February 1998, the Committee of State Property and Privatisation of the Ministry of Finance ("CSPPMF") sold 31.9% of its shares in Almaty Heavy Industry ("AHM") to Temir-Kon LLP ("Temir Kon") on various undertakings, including one to the effect that AHM's business would remain intact. By 2 April 2007 these shares had been transferred to Mr Bolat Nazarbayev, evidently giving him from 2007 a majority shareholding consisting of 86.7812% or thereabouts of AHM's shares.
6. On 18 April 2007 AHM acquired 37.6428 hectares of land at 189 Tole bi Street, Almaty from the Land Relations Department of Almaty, and on 17 May 2007 it sold 26.5802 hectares of the land so acquired to PLS Investment Co. At about the same time, it also sold a further 3.0918 hectares, indirectly it appears, to Mr Bolat Nazarbayev, who some two years later on 6 August 2009 transferred these 3.0918 hectares to PLS Investment Co.
7. On 1 April 2009 it appears that it was agreed between CSPPMF, Temir-Kon and Mr Bolat Nazarbayev that Mr Nazarbayev should step into the shoes of Temir-Kon for the purposes of compliance with what were evidently treated as continuing undertakings arising from the original share sale of 18 February 1998; and on 2 April 2009 Mr Nazarbayev sold to PLS-TM 86.7812% of the shares in AHM, which included the 31.9% of the shares which he had by 2 April 2007 acquired from Temir-Kon.

8. At various points of time, CSPPMF engaged consultants to check whether the undertakings were being fulfilled, and in 2009 its consultants, Firm Bayau, found non-fulfilment. This led to proceedings by CSPPMF seeing to set aside the sale of the 31.9% of shares in AHM by Mr Nazarbayev to PLS-TM and to return the shares to the state ownership of CSPPMF. After initial defeats, Mr Nazarbayev and PLS-TM were, with the support of AHM as third party, successful in resisting the claim by virtue of a judgment of the Supervisory Judicial Board for Civil and Administrative Cases of the Supreme Court of Kazakhstan and a subsequent judgment of District Court No 2 Auezov District dated 11 September 2012, which was it appears upheld on appeal on 30 November 2012.
9. This notwithstanding, on 31 August 2022 the General Prosecutor's Office of Kazakhstan (Almaty Office) addressed to the CSPPMF (Almaty Office) a Representation referring to a further review by Firm Bayau in 2014 and taking direct issue not only with Mr Bolat Nazarbayev's sale of the 31.9% shareholding to PLS-TM, but also with various dispositions of or dealings with AHM's property, based on alleged breaches of the undertakings as well as some other alleged features of the transactions. In particular, it challenged the validity of the sale by AHM on 17 May 2007 of 26.5082 hectares to PLS Investment Co and the sale by AHM also in May 2007 of the further 3.0918 hectares to Mr Bolat Nazarbayev.
10. Having received the Representation, CSPPMF on 16 September 2022 passed it on to AHM and to Mr Bolat Nazarbayev, with the admonition that by virtue of what the Representation said and in order to fulfil the General Prosecutor's directive, they needed "to work to return the shares of [AHM] and its property to state ownership [by] 10.10.2022"; and that "in case of failure to comply with the requirements of this notice, the Department will take action in accordance with applicable law".
11. In response to this development, the Court is informed that PLS-TM "as the current shareholder" in AHM filed a complaint with the General Prosecutor of Kazakhstan's Office against its Almaty Office's Representation. AHM submits that, in alleged violation of Article 91 of the Republic's Administrative Procedural Code, this complaint was redirected to the Almaty Office, which was itself its object and where the complaint would be considered by a direct subordinate of the Deputy Prosecutor for Almaty whose Representation was in question. On 28 November 2022 the Almaty Prosecutor's Office issued a response to the effect that, since the Representation did not implement (i.e. presumably: affect) any third party's rights or obligations, there were no legal grounds for challenging it. An appeal was lodged, about the outcome or progress of which the AIFC Court is not informed.
12. In further response to CSPPMF's communication of the General Prosecutor's Representation, the present claims were issued by PLS Investment Co on 23 December 2022. In Case No. 31, PLS Investment Co asks the AIFC Court to declare null and void the sale contract dated 6 August 2009 by which it bought 3.0918 hectares of land from Mr Bolat Nazarbayev. In Case No. 32, PLS Investment Co claims asks the AIFC Court to declare null and void the sale contract dated 17 May 2007 by which it bought 26.5082 hectares of land from AHM.
13. In both cases, the Defendants have filed Defences resisting the claims, and maintaining that no basis exists for challenging private sales in favour of bona fide purchasers. Mr Bolat Nazarbayev's Defence also highlights the rejection of the State's previous attempt to challenge the share sales, referred to in paragraph 8 above.

14. One further development should be recorded. It appears that the General Prosecutor has been before the Judicial Colloquium for Civil Cases (which may be the same as the Supervisory Judicial Board for Civil and Administrative Cases) of the Supreme Court of Kazakhstan and by decision dated 2 March 2023 obtained, on unknown grounds, the cancellation of the judgment of District Court No 2 Auezov District dated 11 September 2012 and the appellate decision dated 30 November 2012 upholding it on appeal, and their replacement by a judgment setting aside the contract dated 2 April 2009 for the sale by Mr Nazarbayev to PLS-TM of 31.9% of the shares in AHM. While this certainly underlines the desirability of some clear and definitive resolution of all issues arising from long-past transactions, whether involving shares or property, the question remains whether the AIFC Court is or can be an appropriate and effective court for this purpose as regards the property sales referred to in paragraphs 6 and 12 above.
15. When the matter came first before the AIFC Court, the Court questioned the parties about their respective stances, and, in particular, how it came about that PLS Investment Co was advocating the invalidity of property purchases which it had made, and was (in doing this) also taking a different attitude to all (including a company, PLS-TM, in the same group as it) engaged in the previous proceedings relating to the shares. The response was to the effect that PLS Investment Co did not really support the position taken by the General Prosecutor and CSPPMF, which counsel for the Claimants describes as “a superficial evaluation”; and it wanted, by bringing the present proceedings challenging the validity of the property sales, to obtain a reliable legal ruling on the position. One may however fairly question whether the best legal analysis and outcome are likely to be promoted by litigation between parties who, in reality, share a wish to achieve, and in all probability a commercial interest in achieving, the same outcome.
16. The Court also raised with the parties the apparent incongruity of proceedings in the AIFC Court seeking on their face to give effect to the admonitions of the General Prosecutor and CSPPMF, in circumstances where the persons who might be thought really interested in achieving that outcome were CSPPMF, which (as the Court was informed) had not, at that stage, been informed of the proceedings. The parties pointed out the State was not involved in the sales transactions the subject of the present proceedings. That is true, but does not alter the fact that, if the General Prosecutor’s Representation and CSPPMF’s admonition were given effect, CSPPMF would be the apparent beneficiary.
17. After hearing representations, and despite submissions from all sides that it should not do this, the Court directed that notice be given to CSPPMF of the present proceedings. Notice was given by the Registry, but without, so far as appears, any response or reaction from CSPPMF. No application was made for the Court to join CSPPMF, and it must be doubtful whether the Court would have any jurisdiction to do this, without CSPPMF’s consent.
18. The Court was informed from all sides that the parties trust the AIFC Court to adjudicate fully and fairly on the issues raised by the opposing positions which they formally advance. The Defendants also made clear that they did not wish to litigate against, effectively, the General Prosecutor in proceedings in the ordinary Kazakh courts. Nothing that this Court can do can, however, remove the exposure of all parties concerned to litigation in the Kazakh courts instigated by the General Prosecutor or commenced by CSPPMF. That is evidenced by the prior proceedings involving the shares, in which Mr Nazarbayev and AHM, as well as PLS-TM, have been involved over the years 2009 to 2012 (paragraph

8 above) and in 2023 (paragraph 14 above). PLS-TM's administrative law challenge to the Representation also evidences that some matters can only be pursued by litigation in the ordinary Kazakh courts (administrative proceedings being expressly excluded from the AIFC Court's jurisdiction by Article 13(4) of the Constitutional Statute No. 438-V ZRK of 7 December 2015 (as amended)).

19. In that light, the Court enquired of the parties what would be the effect of any judgment given, either way, by the AIFC Court, in the absence of the General Prosecutor and CSPPMF. In answer, it was accepted that an AIFC Court decision on the issues now sought to be put before it could not bind CSPPMF or preclude it from taking any steps or proceedings otherwise open to it to follow up its admonition. That must, as the Court sees it, be correct. In these circumstances, it is hard to think that any judgment by the AIFC Court would solve any real problem, or indeed be of much more than, perhaps, intellectual interest.
20. The AIFC Court exists to offer to the commercial community the administration of the law on a common law procedural basis, and it will do this in any appropriate case. But Regulation 26(10) contemplates, correctly, that there may be some, even if probably few, cases in which the Court should exercise restraint.
21. In the present cases, and in the light of the considerations which I have set out, the Court has reached the conclusion that, despite the weight to be attached to the parties' express accord, it would not be desirable or appropriate for the AIFC Court to exercise its jurisdiction by adjudicating upon the issues raised by the two present cases. They are issues which can and should be determined before the ordinary courts, either at the instance of CSPPMF which has a real interest in advancing any challenge that can be made to the property sales or at least in circumstances, which the ordinary courts could no doubt ensure, where CSPPMF would be bound by any decision which the court might reach. The AIFC Court will decline jurisdiction accordingly, pursuant to AIF Court Regulation 26(1). It is for the parties to advise themselves how to address the circumstances arising from this decision. The Court will however receive and consider any submissions, if any, which any party wishes to make within 21 days from today regarding the costs incurred in the present proceedings to date.

By Order of the Court,

The Rt. Hon. The Lord Mance,  
The Chief Justice of the AIFC Court

Representation:

**CASE No: AIFC-C/CFI/2022/0031**

The Claimant was represented by Mr. Makish Yeskarayev, independent external lawyer, Astana, Kazakhstan.

The Defendant was represented by Mr. Vladislav Bykov, independent external lawyer, Astana, Kazakhstan.

**CASE No: AIFC-C/CFI/2022/0032**

The Claimant was represented by Mr. Makish Yeskarayev, independent external lawyer, Astana, Kazakhstan.

The Defendant was represented by Ms. Dinara Azhbenova, independent external lawyer, Almaty, Kazakhstan





IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

3 February 2023

CASE No: AIFC-C/CFI/2022/0030

(1) LIU ZIJIA

(2) LEI QU

Claimants

v.

ALIBEK TULEPOV

Defendant

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JUDGEMENT & ORDER

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Justice of the Court:

Justice Tom Montagu-Smith KC



## **ORDER**

1. The application for an adjournment of the hearing is dismissed.
2. The Claim is dismissed.

## **JUDGEMENT**

1. This is a claim brought by two individuals, Liu Zijia and Lei Qu who are shareholders of an AIFC company, Grey Cattle Management Limited (“the Company”). The Claimants own 90% of the shares in the Company. The Defendant, Mr Alibek Tulepov, owns the remaining 10%.
2. The Company was incorporated on 2 February 2022. It appears that the shareholders intended it would operate as a cryptocurrency mining business. I am told that it is not now trading.
3. The Claimants seek an order compelling the Defendant to withdraw from the company. In practice, they seek an order requiring the Defendant to transfer his shares in the Company to them.
4. At the hearing, the Claimants were represented by Mr Tuyakbaev and the Defendant represented himself. I am grateful for the courteous and clear representations made by each of them.
5. At the start of the hearing, the Claimants applied for an adjournment of one month to allow them to consider new information which had been received, I was told, some three days before. A supplier to the Company had, it was said, alleged that further money was owed by the Company in respect of equipment it had purchased. I dismissed the adjournment application primarily because I could not see how that information could affect the outcome of the case. The Claimants indicated that a month would allow a window for discussion, after which the claim might be withdrawn. The Defendant pointed out that discussions could take place in any event and there was no point in delaying the conclusion if the new information would make no difference. I agreed.
6. The Claimants say that, in late 2021, they purchased for the company at their own expense the equipment necessary to set up a cryptocurrency mining operation. The cost is said to have been in excess of USD 100,000. The Claimants say that the Defendant has only contributed KZT 10,000. The Defendant disputes this. He considers his contribution was greater.
7. The Claimants attached a schedule of “administrative and capital expenses” for the period January to July 2022. According to the figures stated there, the capital costs on investments incurred are stated to be CNY 464,417, equivalent to USD 68,942 at today’s exchange rate. Other costs listed include CNY 286,065 for “wages and social security contributions”, CNY 11,216.19 for “spare parts”, CNY 11,452.87 for “office expenses”, CNY 80,467.28 for customs clearance fees, a prepayment of 50% for electricity in the sum of CNY 316,000, storage costs of CNY 19,251, a business trip at CNY 188,436.62 (nearly \$28,000), CNY 9,879.78 for rent, CNY 61,979.06 for “costs at the start of the project”, CNY 1,688 for an office computer, shipping costs of CNY 148,597.32, legal service costs of CNY 55,860. The total sum said to have been invested is CNY 1,655,310.35 (c. US\$245,729.90).

8. The Defendant points out that these alleged expenses are not supported by documentary evidence. I also note that some of them appear very difficult to understand. The “capital expenses” are presumably the computers and associated equipment required for the mining operation. However, it is very difficult to see why it could be necessary to incur some of the other alleged expenditure or even what some of that expenditure was.
9. It appears that the Claimants paid for the expenses on behalf of the Company. It is not said that the payments were made by way of loans to the Company, creating a corresponding debt from the Company to the Claimants.
10. The Claim documents offer little explanation for why the Defendant could be ordered to give up his shares.
11. Absent some specific agreement, the question of who funded the company’s purchases and activities is of only historical interest. As things stand, the Defendant owns 10% of the Company. On liquidation, he would – all things being equal – ordinarily be entitled to 10% of its net assets. The Company owns at least some assets which, although likely diminishing, are likely to have some value.
12. The Claimants say that, as a result of Covid-19, delivery of the computing equipment was delayed and the venture became unprofitable. The Company has not traded, is earning no profits and the Claimants have no further interest in pursuing business in Kazakhstan. The Claimants wrote to the Defendant asking him to withdraw from the company. Mr Tulepov accepts that he received the letter but did not respond. He saw no legal basis for the demand.
13. I asked the Claimants’ counsel to explain at the hearing on what legal basis I could make an order depriving the Defendant of his shares. Counsel was unable to provide any real assistance on this point. In essence, his position was that the Defendant had not cooperated with the Claimants’ request and so they had turned to the Court for help. The Defendant disputes this account. He did not reply to the letter. However, he says that he did try to contact the Claimants without success.
14. It does not much matter which account is correct. It is obviously in everyone’s interests for the parties to cooperate in winding up the Company if there is no intention of it trading. However, even if a minority shareholder fails to cooperate, they cannot simply be deprived of their shares as a result.
15. Counsel for the Claimants accepted that the Defendant should be entitled to some compensation in respect of his shares. When asked about this, he said that it was probable that the Claimants had offered some compensation, but he accepted that that was only his opinion and he had no information either way. When I asked him what level of compensation the Defendant could expect, counsel appeared to suggest that he should be entitled only to the return of his initial capital contribution of KZT 10,000. On any view, that would be the wrong basis for assessing the value of the Defendant’s shares. The present value of shares in a company is not measured by reference to the shareholder’s initial financial contribution. There are any number of reasons why



parties should agree a different shareholding arrangement. Once the shareholding is settled, the shareholders' interest follows the fortunes of the company.

16. I do not know and am not in a position to decide what the net assets of the company are and so what the Defendant's shares are worth. That is an investigation that would normally be undertaken in a liquidation. There is no need for Court intervention when an AIFC company is wound up voluntarily under the AIFC Insolvency Regulations, Part 4, Chapter 2. It is to be hoped that, with better communication, these parties will be able to reach a fair agreement for distribution of the Company's net assets. Mr Tuyakbaev's assistance today has been extremely pragmatic and helpful. It may be that his intervention can help the parties find agreement. If they cannot, a liquidator can be appointed to do so. For present purposes, however, I can see no legal basis on which I could make an order simply requiring the Defendant to give his shares to the Claimants, and none has been explained either in writing or by counsel.
17. For those reasons, I dismiss the claim.

By Order of the Court,

Tom Montagu-Smith KC,  
Justice, AIFC Court

Representation:

The Claimant was represented by Mr. Olzhas Tuyakbayev, Chief Legal Officer, PLKZ LLP.

The Defendant was represented by himself.



IN THE COURT OF APPEAL  
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

2 May 2023

CASE No: AIFC-C/CA/2022/0029

Ministry of Healthcare of the Republic of Kazakhstan

Appellant

v

Firm 800 Limited Liability Partnership

Respondent

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JUDGMENT AND ORDER

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Justice of the Court:

Justice Sir Stephen Richards

**ORDER**

**The application for permission to appeal is refused.**

**JUDGMENT****Introduction**

1. These proceedings arise out of an Arbitration Award (“the Award”) dated 4 November 2022 made by Dr Askar Kaldybayev, the sole arbitrator appointed by the Chairman of the International Arbitration Centre (“the IAC”) of the Astana International Financial Centre (“the AIFC”), in IAC Case No.12/2022. The arbitration related to a claim by Firm 800 Limited Liability Company (“Firm 800”) for payment for services rendered to the Ministry of Healthcare of the Republic of Kazakhstan (“the Ministry”) under a contract for conducting s social media campaign with visual support (“the Contract”). In Section G of the Award the arbitrator ordered the recovery, by Firm 800 from the Ministry, of debt in the amount of USD 27,747.14, the costs of the arbitrator’s fee in the amount of USD 1,000, and legal costs in the amount of USD 1,800. Firm 800 then applied without notice to the AIFC Court of First Instance (“the CFI”) for recognition and enforcement of the Award in accordance with Article 45 of the AIFC Arbitration Regulations 2017. By a Judgment and Order dated 7 December 2022 in Case No. AIFC-C/CFI/2022/0023, the Court granted the application, in these terms:

“2. Having read the Award it appears to me that application is justified. Accordingly, I hereby order:

That the Ministry of Healthcare of the Republic of Kazakhstan pay to Firm 800 Limited Liability Company:

- (1) debt in the amount of USD 27,747.14 (twenty-seven thousand seven hundred and forty-seven dollars and fourteen US cents);
- (2) the costs of the Arbitrator’s fees in the amount of USD 1,000 (one thousand dollars);
- (3) the legal costs in the amount of USD 1,800 (one thousand eight hundred dollars).

By no later than 6pm Astana time on Friday 6 January 2023, being 30 days from the date of this Judgment and Order.

3. The Defendant is given liberty to apply to have this Order set aside within 14 days of service upon it of this Order.”
2. If the Ministry wished to challenge the CFI’s Order, the appropriate course would have been to apply to the CFI itself, pursuant to the “liberty to apply” granted by paragraph 3 of that Order, to have the Order set aside. That fits with the procedural provisions contained in Section II (Recognition and Enforcement of Arbitral Awards) of Part 27 of the AIFC Court Rules. In particular, Rule 27.44 provides that “[w]ithin 14 days after service of an Order made without notice or within such other period as the Court may set: (1) the defendant may apply to set aside the Order; and (2) the award shall not be enforced until after: (a) the end of that period; or (b) any application made by the defendant within that period has been finally disposed of”.

3. The Ministry, however, has chosen a different procedural route. By an appellant's notice issued on 23 December 2022 it has applied for permission to appeal to the AIFC Court of Appeal against the CFI's Order. That is the application now before the Court.
4. The procedural route chosen by the Ministry not only differs from the route contemplated by the CFI's own Order and the AIFC Court Rules, but has clear practical disadvantages.
5. First, by Rule 29.4 of the AIFC Court Rules, an appeal does not operate as a stay of the decision of the lower Court unless the appeal Court or the lower Court orders otherwise; nor, therefore, does an application for permission to appeal. In the absence of a stay, there has been nothing to stop enforcement of the Award in accordance with the CFI's Order.
6. Secondly, an appeal involves additional hurdles. Rule 29.6 of the AIFC Court Rules provides that permission to appeal may be given where the appeal Court considers that (1) the appeal would have a real prospect of success or (2) there is some other compelling reason why the appeal should be heard; and by Rule 29.7 success on an appeal depends on establishing that the decision of the lower Court was (1) wrong or (2) unjust because of a serious procedural or other irregularity in the proceedings in the lower Court. Yet there is nothing wrong in principle with the CFI entertaining a "without notice" application for recognition and enforcement of an arbitral award: such a procedure is expressly provided for by Section II of Part 27 of the AIFC Court Rules. Where an order is then made in the terms of the Order in this case, the requirements of fairness and procedural regularity are plainly met by giving the defendant an opportunity to apply to the CFI to set aside the Order before enforcement takes effect. If the defendant does not use that opportunity but seeks to put a case forward for the first time by way of appeal, then even if the Court of Appeal is willing to entertain the appeal the defendant is likely to face an uphill task to persuade the Court that the CFI fell into error on the basis of matters that were not advanced before that Court.
7. It is possible, however, that in seeking permission to appeal in this case rather than making an application to set aside pursuant to the "liberty to apply" in paragraph 3 of the CFI's Order, the Ministry misunderstood the effect of that paragraph. I have decided in the circumstances to put to one side the reservations expressed above and to look at the substance of the Ministry's application for permission to appeal as if the points now advanced had been advanced before the CFI on an application under paragraph 3 of the CFI's Order and had been considered and rejected by that Court. As will become apparent, however, I consider there to be no merit in the points advanced.
8. The grounds set out in the appellant's notice are these:
  - (1) Reliance is placed on a letter of objection to the initiation of arbitration proceedings, dated 31 December 2021, to which it is said that the arbitral tribunal did not give its response or a legal assessment.
  - (2) It is submitted that the applicable law under the Contract was that of the Republic of Kazakhstan, that by paragraph 3 of Article 386 of the Civil Code of the Republic of Kazakhstan, if the legislation or the contract provides for the term of the contract, the end of this period entails the termination of the parties' obligations under the contract; and that the Contract in this case had ceased to be valid at the date of filing the claim at the IAC: Firm 800 thus had no right to apply

to the IAC, and the case was subject to consideration in the Specialized Interdistrict Economic Court of Astana.

- (3) It is submitted that by paragraph 1 of Article 282 of the Civil Code of the Republic of Kazakhstan, the use of foreign currency when making settlements on obligations in the territory of the Republic of Kazakhstan is allowed in cases and under conditions determined by legislative acts of the Republic of Kazakhstan or in accordance with the procedure established by them; but the arbitral tribunal did not decree the legal basis on which it decided to order recovery of amounts denominated in US dollars.
  - (4) It is submitted that the arbitral tribunal did not substantiate its refusal of a request to involve persons working on the Contract who could explain the essence of the Ministry's refusal to accept the services of Firm 800, and that the tribunal, not knowing about the details of the case, made an unfair arbitration decision only taking into account the position of Firm 800.
9. In addition to the Ministry's application, the Court has before it written submissions on behalf of Firm 800 in opposition to the application, pursuant to Rule 29.14 of the AIFC Court Rules. Although the Ministry's document contains a request for an oral hearing, I am satisfied that the application can be fairly determined on paper without an oral hearing (see Rules 29.16-29.17 of the AIFC Court Rules).

#### **The relevant legal framework**

10. By Article 45 of the AIFC Arbitration Regulations, an arbitral award shall be recognised as binding within the AIFC and, upon application in writing to the AIFC Court, shall be enforced within the AIFC subject to the provisions of the article and of Articles 46 and 47. Article 47(1) lays down limited grounds for refusing recognition or enforcement. The only one of possible relevance to the Ministry's present application is that "the arbitration agreement is not valid under the law to which the parties have subjected it" (Article 47(1)(a)(i)). Neither that nor any of the other grounds allows the Court to review the merits of an arbitrator's award or decision on substantive issues, whether of fact or law, made within his or her jurisdiction. The position is the same in that respect as that which applies under the provisions of Article 44 concerning an application for setting aside an arbitral award, as to which see the judgment of the AIFC Court in Case No. AIFC-C/CFI/2022/0012, *Aksaystroy-2020 LLP v. Metallinvestatyraru LLP*, in particular at paragraphs 13-17 (per Lord Mance, Chief Justice).

#### **The letter of objection dated 31 December 2021**

11. The letter dated 31 December 2021 upon which the Ministry's first ground of appeal is based was not supplied with the appellant's notice but was sent separately to the Court following a request by the Court. The letter was the Ministry's answer to Firm 800's request for arbitration. It consisted mainly of arguments that the Ministry was entitled to reject Firm 800's claim because of improper performance and failure to achieve the objectives of the Contract. To the extent that the Ministry pursued those arguments before the arbitral tribunal, they were rejected by the tribunal for reasons given in the Award; and the tribunal's decision on the substantive merits is not open to review by the Court. If and in so far as arguments about the termination of the parties' obligations on termination of the Contract were intended to relate to the validity of the arbitration agreement, the issue is considered below under the second ground of appeal. It was in any event not necessary for the arbitral tribunal to make separate reference to the letter.



### Whether there was a right to apply to the IAC

12. The Ministry's second ground rests on the proposition that where, as a matter of Kazakh law, the parties' obligations under a contract have terminated on the term of the contract (or "the validity period of the agreement") coming to an end, the contractual provisions for arbitration are no longer effective. That, however, misunderstands the legal position.
13. The Contract between the parties provided in Clause 49.1 that "Any dispute between the Parties or relating to this Contract which cannot be settled amicably may be submitted by either Party to arbitration in the manner provided for in the SCC". "SCC" was defined as meaning the Special Conditions of Contract. The relevant provision of the Special Conditions of Contract read:

"49. Disputes shall be settled by arbitration in accordance with the following provisions: Any dispute, controversy, difference or claim, whether contractual or non-contractual, arising out of or in relation to this Agreement, including its existence, validity, interpretation, performance, breach or termination, shall be referred to and finally resolved by arbitration administered by the International Arbitration Centre of the Astana International Financial centre ('IAC') in accordance with the IAC Arbitration and Mediation Rules in force on the date on which the Arbitration is filed with the Registrar of the IAC, which Rules are deemed to be incorporated into this clause.

...

The seat of the arbitration will be the Republic of Kazakhstan. The law governing the arbitration proceedings shall be the law of the seat."

14. The effect of a contractual provision in almost identical terms was considered by the Court in Case No. AIFC-C/CFI/2021/0008, *Ministry of Healthcare of the Republic of Kazakhstan v. Success K Limited Liability Partnership*, to which the same Ministry was a party. In that case the Court rejected an argument by the Ministry that the arbitration agreement was invalid for failure to comply with the Arbitration Act of the Republic of Kazakhstan. The detailed reasoning is not repeated here, but the essence of the matter can be seen in paragraph 26 of the Court's judgment (per Lord Mance, Chief Justice):

"Reading Special Condition 49 as a whole, what the parties were agreeing was to resolve any disputes by IAC arbitration within the jurisdiction of the AIFC which is within the Republic of Kazakhstan and to do this subject to the arbitral law of the IAC which is found in the AIFC Arbitration Regulations and the IAC Rules. ... The arbitral law is therefore for all purposes that of the AIFC and IAC ...."

15. The effect of Special Condition 49 is the same in this case. The law governing the arbitration is the arbitral law of the IAC. It is distinct from the law governing the merits of the substantive dispute (in this case the law of the Republic of Kazakhstan). An arbitration agreement that is subject to the arbitral law of the IAC does not cease to exist because the substantive provisions of the contract in which it is incorporated have come to an end; nor is the IAC thereby deprived of jurisdiction to entertain a claim relating to the contract. Article 7 of the IAC Rules on Arbitration and Mediation covers the position in this way:

“7.1 The Tribunal has the power to rule on its own jurisdiction, including on any objections with respect to the existence, validity or scope of the arbitration agreement.

7.2 An arbitration agreement which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the Tribunal that the contract is null and void shall not necessarily entail the invalidity of the arbitration agreement, and the Tribunal shall not cease to have jurisdiction by reason of any allegation that the contract is non-existent or null and void.

7.3 Any objection that the Tribunal does not have jurisdiction shall be raised as soon as practicable and no later than in a Statement of Defence or in a Statement of Defence to a Counterclaim. ...”

The rule reflects the provisions of Article 26 of the AIFC Arbitration Regulations 2017 concerning the competence of the arbitral tribunal to rule on its jurisdiction.

16. It follows that the arbitral tribunal in the present case plainly had jurisdiction to entertain Firm 800’s claim. Moreover, though the point is not necessary for my decision, the Ministry’s objections regarding jurisdiction were raised too late, given that it failed to raise them within the time specified by Rule 7.3 and, on the contrary, it participated actively throughout the arbitration proceedings.

#### **Whether the arbitral tribunal was entitled to specify the amount in US dollars**

17. Firm 800’s invoices to the Ministry, and its claim to the IAC, were expressed in US dollars. I can find nothing in the Award to suggest that issue was taken by the Ministry at the time with the validity of that approach. Furthermore, paragraph 2 of Article 6 of the Law of the Republic of Kazakhstan dated 2 July 2018, No.167-VI “On Currency Regulation and Currency Control”, to which attention has been drawn by the written submissions on behalf of Firm 800, provides that currency transactions between residents and non-residents can be carried out in national and/or foreign currency. Since Firm 800 is non-resident, being a foreign company registered under the legislation of Ukraine, there is on the face of it a valid basis under the law of the Republic of Kazakhstan for the arbitrator to have ordered recovery of amounts expressed in US dollars. It was not necessary for him to spell the matter out. In any event the issue relates to the substantive merits of the decision, which the Court cannot review, rather than going to the validity of the decision.

#### **The refusal to allow the Ministry to call certain witnesses**

18. The Ministry’s fourth ground relates to the arbitrator’s refusal of an application, made by the Ministry in the course of the final hearing of the arbitration, that former employees of the relevant Project Management Team be called as witnesses to provide evidence regarding the performance by Firm 800 of its duties under the Contract. The arbitrator dealt with this at paragraphs 40-56 of the Award, giving detailed reasons (including the lateness of the application) for the refusal of the application. It was plainly open to the arbitrator, having regard *inter alia* to Articles 13.4, 14.1, 14.3 and 20.2 of the IAC Rules on Arbitration and Mediation, to make the decision he did. In any event this issue

relates again to the substantive merits of the decision, which the Court cannot review, rather than going to the validity of the decision.

### **Conclusion**

19. An appeal would have no real prospect of success, and there is no other compelling reason why an appeal should be heard. The application for permission to appeal is therefore refused.

By the Court,

### **Representation:**

The Appellant was represented by Mr. Zhanibek Seralinov, in-house lawyer, Ministry of Healthcare, Astana, Kazakhstan.

The Respondent was represented by Mr Ravil Kassilgov, Partner at Tukulov & Kassilgov Litigation LLP, Astana, Kazakhstan.



IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

24 March 2023

CASE No: AIFC-C/SCC/2022/0028

Kaniya Bizhanova

Claimant

v.

Center for Scientific and Technological Initiatives Ltd.

Defendant

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JUDGMENT

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Justice of the Court:

Justice Charles Banner KC

### ORDER

1. **The Claim is allowed to the extent that the Defendant shall pay the Claimant the sum of 747 866,75 KZT within 7 days of this Order.**
2. **In all other respects the Claim is dismissed.**
3. **Provided that the Defendant complies with paragraph 1 of this Order, there shall be no order as to costs.**

### JUDGMENT

1. By this claim, the Claimant, Ms. Bizhanova, seeks various remedies from the AIFC Small Claims Court relating to her contract of employment with the Defendant, Center for Scientific and Technological Initiatives Ltd.
2. The Claimant commenced employment with the Defendant on 3<sup>rd</sup> May 2022. The Claimant contends that she was not provided with a Written Contract of Employment within the two month timescale required by Regulation 11 of the AIFC Employment Regulations (AIFC Regulations No. 4 of 2017 as amended, referred to below as “**the Employment Regulations**”). She contends that her contract of employment was later wrongly terminated by the Defendant and seeks various heads of damages as a result of that, along with her reinstatement and her costs of these proceedings.
3. It is common ground between the parties that the claim is within the jurisdiction of the AIFC Court pursuant to Regulation 4(3) of the Employment Regulations, and that it is appropriate for determination by the Small Claims Court (“**SCC**”) having regard to Rule 28.2 of the AIFC Court Rules (“**the Court Rules**”).
4. The Defendant resists the claim in its entirety, principally on the basis that it was entitled to terminate the Claimant’s employment either because she had committed a repudiatory breach of contract by virtue of having failed properly to give notice of her sick leave for a significant period during July 2022 (entitling it to dismiss her without notice under Regulation 61 of the Employment Regulations), or because such termination happened during her three month probation period under Regulation 15 of the Employment Regulations (entitling it to dismiss her with 1 week’s notice).
5. A further, separate issue is whether the Defendant was entitled under Regulation 20 of the Employment Regulations to deduct various sums from the Claimant’s salary during the time when, on both parties’ cases, she was still employed by the Defendant.

6. Neither party requested a hearing. However, the Court considered that it would be in the interests of justice to hold a hearing given the nature of the factual and legal issues in dispute.
7. At the hearing, the Claimant was represented by Mr Dimash Bizhanov and the Defendant by Ms Janara Abdullayeva. Neither party sought to rely upon oral witness evidence. The Court is grateful to both representatives for the articulate and concise way in which they advanced the parties' cases.
8. Much of the written and oral argument in the proceedings focused upon the Claimant's assertions that she was not provided a written contract of employment within the two month timescale provided for by Regulation 11 of the Employment Regulations, and that the version of the written contract upon which the Defendant relies contains a false signature. The Claimant suggested, and the Defendant did not oppose, that the question of the authenticity of her signature ought to be resolved by the Court appointing a handwriting expert. It is clear from Rules 28.27 and 28.28 of the Court Rules that such an appointment would be exceptional. Given the objective of the SCC which is to provide a fast track, streamlined means of determining small claims,<sup>1</sup> the Court would require a convincing case to be made in favour of such an exceptional step.
9. There is no such convincing case here for the following reasons.
10. First, even if taking the purportedly signed written contract at face value, the burden of proof would be on the Defendant, if it wished to justify the dismissal of the Claimant without notice, to persuade the Court that the Claimant had committed a repudiatory breach of the contract: see Regulation 61(2)(b) of the Employment Regulations. The Court is not satisfied that the Defendant discharged this burden of proof on the evidence presented. Although Regulation 34(1) of the Employment Regulations makes clear that the entitlement to sick pay is contingent on the employee giving the employer the notice provided for by Regulation 33, there is nothing in either of these regulations, or in Regulation 61, to indicate that the failure to give such notice is, of itself, sufficient not only to disentitle the employee to sick pay but also to amount to a repudiatory breach of contract so as to justify dismissal without notice. The Court therefore rejects the Defendant's assertion that it was entitled to dismiss the Claimant without notice. The Court also rejects the Defendant's associated assertion that the Claimant orally agreed to her dismissal in these circumstances. There is no clear evidence of such oral

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<sup>1</sup> See Case AIFC-C/SCC/2020/0002 *Nursultan Aliyev v. Proportunity Management Company Ltd* per Justice Charles Banner QC at para. 18, cited with approval on appeal by Justice Sir Stephen Richards (Case AIFC-C/CA/2020/0009 at para. 16).

agreement and the Court is unconvinced, on the balance of probabilities, that such an important agreement would not have been recorded in writing in a form signed or otherwise agreed by both parties.

11. Secondly, as both representatives confirmed at the hearing, it is undisputed that the termination happened during the first three months of the Claimant's employment. Regulation 15 of the Employment Regulations is clear that an Employer may require an Employee to undergo a probationary period not exceeding three months during which the Employer may terminate the Contract of Employment with one week's notice. The dispute about whether and when the Claimant was provided with, and/or agreed, a Written Contract of Employment in this case goes nowhere on this point, because it is clear from Regulation 15 that it is entirely up to the Employer whether to include a probation clause in the Contract. Therefore, there are only two plausible possibilities on the facts of this case in light of the evidence presented to the Court: either (1) the Defendant included within the terms of the Employment Contract a three month probation clause pursuant to Regulation 15; or (2) if the Defendant so required, as it was entitled to do, the Claimant did not agree to such a clause in which case there was no Contract of Employment in the first place. The Court therefore finds on the balance of probabilities that, whatever the precise terms of the Employment Contract between the parties, as a minimum it would have included a three month probationary period as provided for by Regulation 15 of the Employment Regulations. On that basis, the Defendant was able lawfully to terminate the Contract of Employment with one week's notice at the time when it purported to do so.
12. On this basis, the Court finds that the Contract of Employment in this case was lawfully terminated, irrespective of whether or not the purported signature on the Written Contract was a fraud as contended by the Claimant. The exceptional step of the SCC appointing a joint handwriting expert is therefore not necessary for the determination of the claim.
13. Given that the Claimant was entitled to one week's notice, the Court will require the Defendant to pay her damages equating to a week's salary. The uncontested evidence of the Defendant was that the Claimant's monthly salary was 1 346 667 KZT (see the settlement sheets at Attachment 2 to the Defence). This equates *pro rata* to 336 666,75 KZT per week, which is the sum that the Court requires the Defendant to pay to reflect the one week's notice period under Regulation 15 of the Employment Regulations.
14. That then leaves the question of the deductions. The Defendant contends in its Defence, pages 1 to 3, as elaborated at the hearing in response to questions from the Court, that it was entitled to deduct from the Claimant's salary the sums of 261,200 KZT and a further 150,000 KZT on the basis that she

made errors in her job, in particular in relation to procurement procedures. Specifically, the Defendant alleges – albeit in high level terms with few specifics - that the Claimant purchased certain IT Software on behalf of the Defendant for these sums without proper authorisation or lawful basis, and accordingly the Defendant contends that the Claimant was not entitled to charge back these sums as expenses. The Claimant responded at the hearing that these purchases were in fact made, and were made in good faith.

15. As the party making this assertion, and as the party who must justify the salary deduction under Regulation 20 of the Employment Regulations, the Defendant bears the burden of proof on this issue. The Court asked the Defendant through Ms. Abdullayeva to explain precisely what evidential basis the Defendant had for contending that these were not expenses which were incurred in fact and in good faith and as such fell within the meaning of Regulation 20(1)(c). Beyond restating the high level allegations set out in the Defence, to which the Claimant responded at the hearing, the Defendant was unable to offer any specifics and in particular did not engage with the precise terms of Regulation 20(1)(c) or with the Claimant's explanation that the expenses were incurred in good faith.
16. In these circumstances, the Court is not satisfied that the Defendant has discharged the burden of proof for these deductions.
17. To this extent, alongside the one week's notice required by AIFC Regulation 15 for termination during the probationary period, but to this extent alone, the Court will allow the claim.
18. In conclusion, therefore, the Court dismisses the Claimant's claims insofar as they contend that the Defendant was acting unlawfully in terminating her employment. The Court, however, allows the Claimant's claim to the limited extent of requiring the Defendant to pay her one week's salary as the notice period under Regulation 15, equating to 336 666,75 KZT, along with a refund of the unlawful deductions of 411,200 KZT. The total amount payable by the Defendant to the Claimant is therefore 747 866,75 KZT.
19. The Court requires the Defendant to pay this sum to the Claimant within 7 days of this Order. The Court's reason for requiring payment with this short timescale is that the sum in question should never have been withheld from the Claimant in the first place. It is evident to the Court that the amounts in question are of real significance to the Claimant personally, and therefore in the circumstances it is in the interests of justice for the Defendant company to compensate her without delay.
20. Provided that the Defendant complies with the Court's timescale for payment of the aforementioned





sums to the Claimant, the Court sees no exceptional basis for an award of costs in this case, for or against either party, bearing in mind the general rule that each party bears their own costs in small claims proceedings before this Court.

By Order of the Court,

Charles Banner KC,  
Justice, AIFC Court

Representation:

The Claimant was represented by Mr. Dimash Bizhanov, independent external lawyer, Astana, Kazakhstan.

The Defendant was represented by Ms. Janara Abdullayeva, lawyer, Center for Scientific and Technological Initiatives Ltd., Astana, Kazakhstan.

IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

23 December 2022

CASE No: AIFC-C/SCC/2022/0027

MS TYURINA ELENA YUREYEVNA

Claimant

v.

(1) MR BISSEMBAYEV BAUYRZHAN

(2) MR ZHAN MUKHTAROVICH MATAKOV

Defendants

(3) ORIENTAL SUNRISE CORPORATION LIMITED

(4) TOTALENERGIES EP DANMARK A/S

Defendants

(5) MAGNETIC OIL LIMITED

Defendant

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ORDER

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Justice of the Court:

Justice Tom Montagu-Smith KC

### PENAL NOTICE

**IF YOU, MR BISSEMBAYEV BAUYRZHAN OR MR ZHAN MUKHTAROVICH MATAKOV DISOBEY THIS ORDER YOU MAY BE HELD TO BE IN CONTEMPT OF COURT AND MAY BE IMPRISONED, FINED OR HAVE YOUR ASSETS SEIZED.**

**IF YOU, MAGNETIC OIL LIMITED DISOBEY THIS ORDER YOU MAY BE HELD TO BE IN CONTEMPT OF COURT AND YOUR DIRECTORS MAY BE IMPRISONED, FINED OR HAVE THEIR ASSETS SEIZED OR THE COMPANY MAY BE FINED OR HAVE ITS ASSETS SEIZED.**

**ANY OTHER PERSON WHO KNOWS OF THIS ORDER AND DOES ANYTHING WHICH HELPS OR PERMITS THE DEFENDANTS TO BREACH THE TERMS OF THIS ORDER MAY ALSO BE HELD TO BE IN CONTEMPT OF COURT AND MAY BE IMPRISONED, FINED OR HAVE THEIR ASSETS SEIZED.**

### ORDER

1. This Order is made against Mr Bissembayev Bauyrzhan, Mr Zhan Mukhtarovich Matakov and Magnetic Oil Limited ("**the Defendants**") by Justice Montagu-Smith KC on the application of Ms Tyurina Elena Yuryevna ("**the Claimant**"). The Judge read the evidence listed in Schedule A and accepted the undertakings set out in Schedule B of this Order.
2. This application was made at a hearing without notice to the Defendants. The Defendants have the right to apply to the Court to vary or discharge this Order – see paragraph 10 below.
3. There will be a further hearing in respect of this Order at 2pm Astana time on 20 January 2023 ("**the Return Date**").
4. Until the Return Date or further Order, the Defendants must not:
  - a. Dispose of, deal with, charge, pledge or otherwise encumber or diminish the value of the shares owned by Magnetic Oil Limited in the following companies:
    - i. Tasbulat Oil Corporation LLC;
    - ii. Kom-Munai LLC;
  - b. Dispose of, deal with or otherwise diminish the value of any other assets of Magnetic Oil Limited.
5. Paragraph 4 applies to all of Magnetic Oil Limited's assets whether or not they are in its own name and whether they are solely or jointly owned. For the purpose of this Order, Magnetic Oil Limited's assets include any asset which the Defendants have the power, directly or indirectly, to dispose of or deal with as if it were Magnetic Oil Limited's.
6. Paragraph 4(b) of this Order does not prohibit the Defendants from disposing of or dealing in any of Magnetic Oil Limited's assets in the ordinary and proper course of Magnetic Oil Limited's business but the Defendants must give the Claimant's legal representatives at least

5 clear working days' advance written notice of any intention to do so in respect of any transaction (or series of connected transactions) exceeding US\$ 50,000 in value.

7. The Defendants may agree with the Claimant's legal representatives that the transaction value referred to in paragraph 6 above be varied, but any agreement must be in writing.
8. The Defendants must:
  - a. By 6pm Astana time on Friday 30 December 2022 inform the Claimant's legal representatives of all of the assets of Magnetic Oil Limited exceeding US\$50,000 in value whether in the name of Magnetic Oil Limited or not and whether solely or jointly owned, giving the value, location and details of those assets;
  - b. By 6pm Astana Time on Friday 6 January 2022 swear and serve on the Claimant's legal representatives an affidavit, setting out the information required by paragraph 8(a) of this Order.
9. The costs of this application are reserved to the Judge hearing the application on the Return Date.
10. Anyone served with or notified of this Order may apply to the Court at any time to vary or discharge this Order (or so much of it as affects that person), but they must first inform the Claimant's legal representatives. If any evidence is to be relied upon in support of the application, the substance of it must be communicated in writing to the Claimant's legal representatives in advance.
11. A Defendant who is an individual who is ordered not to do something must not do it himself or in any other way. He must not do it through others acting on his behalf or on his instructions or with his encouragement.
12. A Defendant which is not an individual which is ordered not to do something must not do it itself or by its directors, officers, partners, employees or agents or in any other way.
13. It is a contempt of court for any person notified of this Order knowingly to assist in or permit a breach of this Order. Any person doing so may be imprisoned, fined or have their assets seized.
14. This injunction does not prevent any bank from exercising any right of set off it may have in respect of any facility which it gave to Magnetic Oil Limited before it was notified of this Order.
15. No bank need enquire as to the application or proposed application of any money withdrawn by Magnetic Oil Limited if the withdrawal appears to be permitted by this Order.
16. Persons outside Kazakhstan
  - a. Except as otherwise provided in sub-paragraph b. below, the terms of this Order do not affect or concern anyone outside the Republic of Kazakhstan.

- b. The terms of this Order will affect the following persons in a country or state outside Kazakhstan:
  - i. the Defendant or his officer or agent appointed by power of attorney;
  - ii. any person who:
    - 1. is subject to the jurisdiction of this court;
    - 2. has been given written notice of this Order at his residence or place of business within Kazakhstan; and
    - 3. is able to prevent acts or omissions outside the jurisdiction of this court which constitute or assist in the breach of the terms of this Order; and
  - iii. any other person, only to the extent that this Order is declared enforceable by or is enforced by a court in that country or state.
- 17. Nothing in this Order shall, in respect of assets located outside of Kazakhstan prevent any third party from complying with:
  - a. what it reasonably believes to be its obligations, contractual or otherwise, under the laws and obligations of the country or state in which those assets are situated or under the proper law of any contract between itself and the Defendant; and
  - b. any orders of the courts of that country or state, provided that reasonable notice of any application for such an order is given to the Claimant's legal representatives.

#### **SCHEDULE A - Evidence**

- (1) The witness statement of Mr Berdygozhin Chingis dated 21 December 2022.
- (2) The claim form, together with 10 Exhibits.
- (3) The Skeleton Argument dated 21 December 2022, together with 7 exhibits.

#### **SCHEDULE B – Undertakings**

- (1) If the Court later finds that this Order has caused loss to the Defendants, and decides that the Defendants should be compensated for that loss, the Claimant undertakes to comply with any order the Court may make.

- (2) As soon as reasonably practicable and in any event by 6pm Astana time on Wednesday 28 December 2022:
- a. the Claimant will amend the claim to join Magnetic Oil Limited as a Defendant and to advance a claim for (a) a derivative claim and (b) a claim for relief under Article 175 of the AIFC Companies Regulations; and
  - b. the Claimant will file and serve the amended claim form on the Defendants to the claim.
- (3) As soon as reasonably practicable, the Claimant will serve on the Defendants:
- a. A copy of this Order;
  - b. Copies of the evidence relied on by the Claimant and all other documents provided to the Court on making the application;
  - c. A note of the hearing on 23 December 2022;
- (4) Anyone notified of this Order will be given a copy of it by the Claimant's legal representatives.
- (5) The Claimant will not without the permission of the Court use any information obtained as a result of this Order for the purpose of any civil or criminal proceedings other than this claim.
- (6) The Claimant will not without the permission of the Court seek to enforce this Order in any country outside Kazakhstan.

**REASONS FOR ORDER OF 23 DECEMBER 2022**

1. The Claimant applies without notice for various interim orders. She is a 50% shareholder of an AIFC company, Magnetic Oil Limited ("**Magnetic**"). I heard the application on 23 December 2022 and granted an Order, limited to freezing certain shares owned by Magnetic and its other assets, subject to their being used in the ordinary course of business. These are my reasons for making that Order.
2. The Claimant and the First Defendant are each 50% shareholders in Magnetic. The Second Defendant is a director.
3. The evidence of the Claimant's husband, Mr Robertovich is that, in November 2022, Magnetic was in advanced negotiations with the Fourth Defendant for the purchase of shares in a company, Total E&P Dunga ("**the Target**"). The value of the transaction was said to be US\$330 million.
4. On 28 November 2022, public statements disclosed that the Fourth Defendant had agreed to sell the Target to the Third Defendant instead ("**the Transaction**").
5. The third Defendant is an AIFC company which was incorporated on 17 November 2022, just 11 days before the Transaction. Its shareholders are the First and Second Defendants, who own 85% and 15% respectively.
6. The Claimant says that she learned about the Transaction only on 6 December 2022, after it was concluded.
7. The Claimant's case is that the Transaction is the product of a conspiracy between the First and Second Defendants to divert a valuable business opportunity away from Magnetic, in breach of the Second Defendant's duties of loyalty to Magnetic as director. In addition, the Claimant may allege (but has not yet alleged) a breach of confidence.
8. The Claimant and her husband on whose behalf she appears to hold the shares have not had much involvement in the management of Magnetic over the course of its life. I am told that they trusted the First and Second Defendants to run the business fairly. She has no influence over the Second Defendant and no power as shareholder to replace him.
9. I am told that, since the Claimant's discovery of the Transaction, neither the First or Second Defendants, nor Magnetic's employed accountant have been attending its offices. The Claimant has had no response to attempts to contact them and has been unable to locate the books and records of the company.
10. The Claimant is now concerned that further attempts may be made to dispose of the assets of Magnetic.
11. As originally advanced, the Claimant sought orders of broadly two types:

- a. Orders suspending or reversing the Transaction; and
  - b. Orders intended to preserve the value of Magnetic's remaining assets, whether by imposing restrictions on dealings with Magnetic's assets or by appointing a manager of Magnetic's business.
12. At the start of the hearing, Mr Tukulov, who appeared on behalf of the Claimant, indicated that he no longer pursued the first of these applications.
  13. In further discussion with Mr Tukulov, he appeared to accept that the most urgent and pressing concern was the preservation of Magnetic's assets. Magnetic owns two oil and gas production companies, Tasbulat Oil Corporation LLC and Kom-Munai LLC. The Claimant however assumes that Magnetic also holds cash in bank accounts, but does not know the identities of the bank or banks and has no information about the amount of funds on hand. Although Magnetic is a holding company, it has offices and at least one employee. It owns the two companies identified and so is likely to receive dividends. It appears likely that it will have at least one bank account.
  14. The focus of the hearing was therefore on the application for an order freezing assets. My view is that any application for the appointment of a receiver or manager can wait until a hearing on notice to the Defendants.

*Without notice application*

15. I asked the Claimant's to address me on the test for hearing an application without notice and why the Claimant said the test was satisfied in this case.
16. Mr Tukulov's starting point was that AIFC law and Court Rules do not govern the procedure and criteria for hearing applications without notice. As a result, Article 4.1.3 of the AIFC Constitutional Law applies. By that provision, Kazakhstan law "*applies in part to matters not governed by this Constitutional Statute and AIFC Acts*". Mr Tukulov's submission was that the issue was governed by Kazakh law. The Claimant therefore provided a detailed analysis of the approach to such issues in the Kazakhstan Civil Procedure Code.
17. In my judgment, that approach is clearly wrong.
18. The circumstances in which the Court will hear an application made without notice are set out in Court Rule 6.7 as follows:

- 6.7 The Court's permission is required for an application to be made without serving an application notice. The Court's permission will be granted:
  - (1) where there is exceptional urgency;
  - (2) where the overriding objective is best furthered by doing so;
  - (3) by consent of all parties;
  - (4) where a Rule or Practice Direction permits; or



- (5) where there are good reasons for making the application without notice, for example, because notice would or might defeat the object of the application.
19. Mr Tukulov's submission was that these tests were vague and so fell to be supplemented by Kazakhstan procedural law. I disagree. The Rules, together with the AIFC Court Regulations provide a code for the determination of civil proceedings before the AIFC Court. They are intended to be flexible, rather than rigid and the language of the Rules reflects that. However, that is quite different from concluding that the question of when applications will be heard without notice is "*not governed by*" AIFC law.
20. Mr Tukulov expressed concern that there might be a tendency for AIFC Court judges who come from the English tradition to resort to English law in deciding cases, rather than applying a Kazakh approach which, he said, was required by the Constitutional Statute. In fact, Judges in the AIFC Court are bound to apply the law as it is stated in the AIFC Constitutional Statute and AIFC Law. Those laws are set out in statutes which require interpretation. Where the laws being applied are derived from English law, English law will, naturally, be of assistance in interpreting the legislation. Reference to English law is not therefore the result of some comparative bias. It is the result of a principled construction of the applicable legislation. Article 4.1.2 of the Constitutional Statute provides in terms that AIFC law may be based on English or other common law principles. That will not be the case for every statute. However where, as here, the principle concerned is derived from English procedural law, English procedural law will inevitably be of assistance in determining the precise scope of the principle. In my judgment, Kazakh procedural law is of no relevance to determining whether the AIFC Court will hear an application made without notice.
21. In the alternative, Mr Tukulov argued that the application fell within Rule 6.7(5). The purpose of the application would, he said, be defeated if notice were given. I accept that. It is not at all clear whether steps could be taken to speed up any transaction for the transfer or encumbrance of Magnetic's assets. Mr Tukulov very fairly informed me that, as their underlying assets are subsurface resources, any transfer or pledge of the shares in Tasbulat Oil Corporation LLC and Kom-Munai LLC would require Ministry approval, which might take about 2 months. Nor is the location of any cash known. However, if a freezing order is justified, there is in my view sufficient risk that notice of the application would prompt dissipation to justify hearing this application without notice.
22. I therefore considered that this part of the application could be made without notice. I indicated that, had the Claimant sought to pursue the other parts of the application, I would not have considered them appropriate for hearing without notice.
23. In hearing the application without notice, I can of course reach no concluded view on the issues of fact and law which arise.

*Interim relief*

24. The power to grant interim relief is provided by AIFC Court Regulations, Article 27. The AIFC Court Rules provide that interim relief will be granted where they are “*necessary in the interest of justice*”: Part 15.
25. Once again, Mr Tukulov argued that the power to grant interim relief was not explained in detail, so that resort could have taken to Kazakhstan procedural law.
26. In my view, that is wrong, substantially for the same reasons as are set out above in respect of without notice applications. The test for granting interim relief is a flexible one. However, these remedies are quite plainly governed by AIFC law, within the meaning of the Constitutional Statute. There is therefore no room for importing Kazakhstan law.
27. The Rules and powers for granting interim relief appear directly derived from English procedural law. English law will therefore be of relevance in determining the detail of when the AIFC Court will grant that relief.
28. In English law, Courts will grant a freezing injunction where the following test is satisfied:
  - a. The claimant has a good arguable case against the Defendant;
  - b. There are grounds to believe that the Defendant has assets which could be made the subject of the order;
  - c. There is a real risk that the judgment will not be satisfied by reason of an unjustified dissipation of assets; and
  - d. In all the circumstances it is just and convenient to make the order sought.
29. Where the Claimant is able to establish a proprietary right to assets held by a Defendant, the Court may make an order to preserve them. The Claimant would normally be required to establish that there is a serious issue to be tried.
30. In my view, the powers conferred on the AIFC Court are intended to replicate these remedies.

#### *Jurisdiction*

31. The AIFC Court’s jurisdiction is set out in the AIFC Constitutional Statute and the AIFC Court Regulations. Article 13.4 of the Constitutional Statute provides:
  - “4. The AIFC Court has exclusive jurisdiction in relation to the hearing and adjudication of the following disputes, but does not have jurisdiction in criminal and administrative proceedings:
    - 1) disputes between AIFC Participants, AIFC Participants and AIFC Bodies and an AIFC Participant or AIFC Body and its expatriate Employees;

- 2) disputes relating to activities conducted in the AIFC and governed by the Acting Law of the AIFC;
- 3) disputes transferred to the AIFC Court by agreement of the parties.”

32. At the interim stage and in the absence of the Defendants, I can only take a provisional view of the Court’s jurisdiction. I consider that it is sufficient at this stage for the Claimant to show that it is reasonably arguable that the Court has jurisdiction over the claim.

33. The core complaints in this case are about the management of Magnetic, an AIFC company, and the subsequent entry into a contract by the Third Defendant, another AIFC company. In my view it is reasonably arguable that the claim falls within Article 4.1 or Article 4.2. The claim as a whole includes (or will include) a dispute between AIFC Participants, Magnetic and the Third Defendant. The management of Magnetic may physically have taken place outside the AIFC. However, it is at least reasonably arguable that the management of an AIFC Company is conducted “*in the AIFC*” for the purposes of Article 4.2. That management also appears to be governed by AIFC law.

*Good arguable case / real issue to be tried*

34. I express no concluded views on the facts at this stage. However, on the evidence I have seen, there is, in my view, a real prospect of Magnetic establishing that a valuable opportunity has been diverted away from it by reason of the breach of duty of the Second Defendant and / or by reason of a conspiracy between the First and Second Defendants to that end.

35. As set out above, on the Claimant’s evidence, the First and Second Defendants have subsequently stopped communications with the Claimant and her husband, Magnetic’s accountant has stopped attending the office and is not communicating with her and the Claimant cannot access any records of the company. In light of that evidence, my view is that there is a real risk that the First and Second Defendants will act to misappropriate further assets of Magnetic. In those circumstances, my view is that Magnetic would be entitled to an injunction to prevent their misappropriation.

36. Those are, however, claims that would normally be brought by Magnetic. Directors’ duties are generally owed to the company, not its shareholders. The possibility of misappropriation of company property is normally a claim of the company, not of its shareholders. I therefore asked the Claimant to address me on how the Claimant as shareholder of Magnetic had standing to pursue those claims.

37. Mr Tukulov frankly accepted that the Claimant had been obliged to move quickly and so the legal basis for the claim was not yet fully developed. He suggested that the facts might support a claim under Section 78 or 85 of the Companies Regulations.

38. I disagree.

39. Section 78(1) of the Companies Regulations provides:

*“A Director of a Company must act in the way the Director honestly considers, in good faith, would be most likely to promote the success of the Company for the benefit of its Shareholders as a whole...”*

40. Section 85(1) provides:

*“If a Director of a Company has, directly or indirectly, an interest in a transaction or arrangement entered into by the Company or a Subsidiary of the Company and the Director is aware that the interest conflicts or may conflict, to a material extent, with the interests of the Company or Subsidiary, the Director must unless the Director has previously declared such interest under section 83 (Duty to declare interest in proposed transaction or arrangement), declare to the other Directors of the Company the nature and extent of the Director’s interest in accordance with this section.”*

41. Section 85(8) provides:

*“If a Director of a Company Fails to declare an interest of under this section or section 83, the Company, a Shareholder of the Company or the Registrar may apply to the Court for an order under this subsection. On the application, the Court may make any order that it considers appropriate, including, for example, either or both of the following:*

- (a) an order setting aside the relevant transaction or arrangement;*
- (b) an order directing the Director to account to the Company for any benefit, gain or profit obtained because of the relevant transaction or arrangement.”*

42. There is no doubt that directors of companies owe duties of loyalty. Article 78 helps to define the content of that duty. However, the duty is owed to the company. The losses which flow from a breach are *prima facie* losses of the company.

43. Section 85(1) is concerned with transactions entered into by the company. Section 85(8) refers to “*this section*” and Article 83. Article 83 also concerns proposed transactions and arrangements with the company. The “*relevant transaction or arrangement*” referred to in section 85(8) must therefore be a transaction entered into by the company making the claim. In the present case, the complaint is that the opportunity was diverted and so no transaction was concluded with the company (Magnetic). I am therefore not satisfied that there is a real prospect of the Claimant establishing a claim under Articles 83 and 85.

44. With some prompting, Mr Tukulov indicated that the Claimant would seek permission to bring a derivative claim on behalf of Magnetic. Alternatively, the Claimant would seek orders for unfair prejudice under section 175 of the AIFC Companies Regulations.

45. In my view, there is a serious issue to be tried (and a good arguable case) on both bases.

46. The AIFC Court Rules recognise the Court’s power to permit derivative claims by shareholders on behalf of companies. In the present case, the Claimant’s position is that she is unable to

cause Magnetic to bring the claims directly. If she was not entitled to bring a derivative claim then, on her case, it could never be brought. I therefore give permission for the Claimant to join Magnetic and seek injunctive relief on its behalf. That permission is provisional and the question of whether the Claimant is entitled to pursue a substantive derivative claim can be revisited when Magnetic has been joined and the Defendants have been put on notice of the claim and application.

47. AIFC Court Rule 12.43 requires that the company be made a Defendant to the action. The Claimant has undertaken to do so.
48. I further consider that there is a serious issue to be tried and a good arguable case that the Claimant would be entitled to relief under section 175 of the Companies Regulations. On her case, with the collusion of the First Defendant, the Fourth Defendant was told that there was no longer any interest on the part of the Claimant and her husband to pursue the purchase of the Target. It appears therefore that there is an arguable case that the First and Second Defendants conducted Magnetic's affairs in such a way as to reject a valuable business opportunity so that they could divert it to their new company. I consider there is a real prospect of that amounting to conduct which is unfairly prejudicial to the Claimant's interests as shareholder. Any use of their powers to control the company by the First and Second Defendants to misappropriate its assets may also be unfairly prejudicial. There is therefore a real prospect of the Claimant establishing a claim for *quia timet* relief to restrain future acts which might be unfairly prejudicial.
49. In all of this I have of course not heard from the Defendants and so can draw no final conclusions of any sort.

*Assets and risk of dissipation*

50. In order to grant an order, I must be satisfied that there is a real, rather than a fanciful or speculative, risk of dissipation of assets.
51. As I set out above, the major known assets of Magnetic are the shares in two companies. There is also likely to be at least one bank account. I am not aware of any other valuable assets of Magnetic.
52. Mr Tukulov identified a number of factors which he said gave rise to a risk of dissipation:
  - a. The facts of the diverted transaction, which show that the First and Second Defendants control Magnetic and may be prepared to use their powers against Magnetic's interests and in their own interests;
  - b. The Claimant has no control over Magnetic;
  - c. The First and Second Defendants are not responding to the Claimant's correspondence. This may indicate that they have no good explanation for their conduct;

- d. Magnetic's employed accountant has stopped attending the office and is not responding to the Claimant. This may indicate that the accountant is involved in the conduct or at least aware of it and similarly has no good explanation for it;
  - e. The Claimant has no access to the documents of Magnetic. This may be the result of deliberate action by those involved in the Transaction and so part of an attempt to cover it up.
53. I agree that these alleged facts give rise to a real risk the steps will be taken to misappropriate Magnetic's assets and prejudice the Claimant unfairly if the First and Second Defendants and Magnetic are not restrained.
54. As set out above, it appears that Ministry consent is required before the shares in the two companies may be transferred or encumbered. However, as Mr Tukulov points out, the Claimant simply cannot know whether permission has already been sought. A transfer or encumbrance may be imminent.
55. Very little is known about Magnetic's cash position. It does however have at least one employee and may receive dividends. There is in my view a real prospect that it has bank accounts which contain cash which may be misappropriated.

*Just and convenient*

56. In the circumstances, I consider it just and convenient to grant an Order prohibiting dealings on the shares of the two companies and restraining any misuse of the accounts.
57. As to the shares, there seems a low prospect of a share transfer for a legitimate purpose and so little prospect of genuine harm from an Order. If a transfer is imminent and there is good reason for it, the Defendants will be entitled to apply to vary or set aside the order on short notice.
58. As to any bank accounts, Mr Tukulov sought to limit the impact of an order by a prohibition only on transfers exceeding US\$50,000. As I pointed out to Mr Tukulov, any order made would be subject to the usual exception for transfers in the ordinary course of business. However, I have adopted Mr Tukulov's threshold in practice by providing in the order that advance notice must be given of any transfer or series of connected transfers which exceed US\$50,000.
59. I understand that there is a danger that a freezing order may in practice stop all transactions on Magnetic's accounts, whatever their value and purpose. If that risk eventuates and if it causes real commercial problems for Magnetic, it will be entitled to apply to the Court for a variation of the Order.
60. The Claimant also sought an order under AIFC Court Rule 15.1(7) requiring the Defendants to provide information about the assets of Magnetic and their location. That sort of order is generally necessary to police the freezing order and ensure that it is being complied with. I have therefore included that within the order, once again limited to assets over US\$50,000. As such, the disclosure obligation is not, in my view, likely to be very onerous.

61. The order I make will remain in place until the Return Date, unless application is made to vary it sooner.

By the Court,

Tom Montagu-Smith KC

Justice, AIFC Court

**Representation:**

The Claimant was represented by Mr. Bakhyt Tukulov, “Tukulov & Kassilgov Litigation” LLP, Almaty, Republic of Kazakhstan.

The Defendant was not represented.



IN THE COURT OF FIRST INSTANCE  
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

26 May 2023

CASE No: AIFC-C/CFI/2023/0027

MS TYURINA ELENA YUREYEVNA

Claimant

v.

(1) MR BISSEMBAYEV BAUYRZHAN

(2) MR ZHAN MUKHTAROVICH MATAKOV

(3) ORIENTAL SUNRISE CORPORATION LIMITED

(4) TOTALENERGIES EP DANMARK A/S

(5) MAGNETIC OIL LIMITED

Defendants

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ORDER

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Justice of the Court:

The Rt. Hon. The Lord Faulks KC





## ORDER

**UPON** the Claimant's claim against the Defendants, filed via claim form dated 19 December 2022 and amended on 17 January 2023 (the "**Claim**")

**AND UPON** the order of Justice Tom Montagu-Smith KC dated 23 December 2022, pursuant to which, upon an application by the Claimant dated 21 December 2023, the Court made an *ex parte* freezing order against the First to Third Defendants, until the return date hearing of the application or further order of the Court (the "**Freezing Order**");

**AND UPON** the Claimant's filing of a notice of discontinuance dated 3 April 2023 in respect of her Claim against the Fourth Defendant, pursuant to which (by virtue of rules 21.3 and 21.6 of the AIFC Court Rules) the Claim against the Fourth Defendant was discontinued;

**AND UPON** the Claimant's filing of an application dated 27 April 2023 seeking permission of the Court to discontinue the Claim against the First, Second, Third and Fifth Defendants pursuant to rule 21.4(1)(a) of the AIFC Court Rules (the "**Application for Permission**");

**AND UPON** the Claimant's filing on 27 April 2023 of a notice of discontinuance in respect of her claim against the First, Second, Third and Fifth Defendants;

### **IT IS ORDERED THAT:**

- (1) The Application for Permission is granted.
- (2) All further proceedings in this Claim be discontinued in their entirety.
- (3) The Freezing Order is discharged.
- (4) In respect of the underlying Claim (to include, for the avoidance of doubt, the Claimant's application for the Freezing Order, and the Claimant's discontinuance of her Claim against the Defendants) there be no order as to costs.



By Order of the Court,

The Rt. Hon. The Lord Faulks KC,  
Justice, AIFC Court

Representation:

The Claimant was represented by Mr. Bakhyt Tukulov, “Tukulov & Kassilgov Litigation” LLP, Almaty, Republic of Kazakhstan.

Defendants 1-3 were represented by:

1. Mr. Roman Khodykin, “Bryan Cave Leighton Paisner” LLP, London, United Kingdom;
2. Ms. Nadia Hubbuck, “Bryan Cave Leighton Paisner” LLP, London, United Kingdom;
3. Ms. Elena Matlak, “Bryan Cave Leighton Paisner” LLP, London, United Kingdom;
4. Mr. Askar Konysbayev, GRATA International Law Firm, Almaty, Republic of Kazakhstan.

Defendant 4 was represented by:

1. Mr. Mukhit Yeleuov, “Kinstellar” LLP, Almaty, Republic of Kazakhstan;
2. Ms. Dina Berkaliyeva, “Kinstellar” LLP, Almaty, Republic of Kazakhstan.

Defendant 5 was represented by Mr. Kairat Yermakhanbet, in-house lawyer, Magnetic Oil Limited, Astana, Republic of Kazakhstan.

**IN THE COURT OF APPEAL  
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE**

**5 June 2023**

**CASE No: AIFC-C/CA/2022/0026**

**Private Company GEOPS Exploration Kazakhstan Ltd.**

**Appellant/Defendant**

**v.**

**Private Company Minerals Operating Ltd.**

**Respondent/Claimant**

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**JUDGMENT**

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**Justice of the Court:**

**Justice Sir Stephen Richards**

## **ORDER**

**The application for permission to appeal is refused.**

## **JUDGMENT**

1. By a decision dated 8 November 2022 in Case No. AIFC-C/CFI/2022/0008 the Court of First Instance of the AIFC (Justice The Rt Hon Lord Faulks KC) ordered the Defendant, Private Company GEOPS Exploration Kazakhstan Ltd. (“GEOPS”), to pay to the Claimant, Private Company Minerals Operating Ltd. (“Minerals Operating”), the sum of 42,339,332.94 KZT with immediate effect. This Court now has before it an application by GEOPS for permission to appeal against that decision. The application is supported by two bundles of material (documents and witness statements) that were before the lower Court. Minerals Operating has filed written submissions in opposition to the application, pursuant to rule 29.13 of the AIFC Court Rules. Although GEOPS has requested an oral hearing, I am satisfied that the application can be fairly determined on the papers (see rules 29.16 and 29.17 of the AIFC Court Rules).
2. Rule 29.6 of the AIFC Court Rules provides that permission to appeal may be given where the appeal Court considers that (1) the appeal would have a real prospect of success or (2) there is some other compelling reason why the appeal should be heard. By Rule 29.7 success on an appeal depends on establishing that the decision of the lower Court was (1) wrong or (2) unjust because of a serious procedural or other irregularity in the proceedings in the lower Court.
3. Reference should be made to the judgment of the Court of First Instance for the detailed context within which the grounds of appeal are advanced. In briefest outline, the Court found that an agreement dated 29 September 2020 between the parties was an agency agreement under which Minerals Operating agreed to assist GEOPS with the conclusion of drilling contracts with companies including Kazakh Altyn, for a remuneration of 10% of the value of each contract concluded; GEOPS entered into a contract with Kazakh Altyn on 9 April 2021; Minerals Operating was entitled to its agency fee of 10% of the value of that contract; but in breach of the agreement GEOPS had failed to pay that fee.
4. The first ground of appeal challenges the Court’s finding that an agency fee of 10% was payable in respect of the contract concluded with Kazakh Altyn, and in particular it challenges the reasoning in paragraph 13 of the Court’s judgment. It is submitted that the agreement had the nature of a framework agreement and that the 10% rate should be considered not as a fixed rate but as the starting point for negotiations between the parties in relation to projects with each individual customer, whether named in the agreement (as in the case of Kazakh Altyn) or unnamed. As part of the argument it is said that the Court failed properly to evaluate the evidence, including the testimony of GEOPS’s witnesses relevant to the commercial practices and intention of the parties. The Court rightly observed (at paragraph 11 of the judgment) that the agreement was not as clear as it might be, but I am satisfied that there was no error in the Court’s approach to the issue of construction or in the conclusion reached on that issue. There is no real prospect of establishing the contrary on an appeal.

5. The second ground of appeal, or series of grounds, concerns the Court's reasoning at paragraphs 20, 21, 24 and 25 of the judgment as to the ending of the agreement and of any continuing obligations under it. It is submitted in particular that the Court failed to consider GEOPS's case that the agreement had terminated on 8 March 2021, prior to the conclusion of the contract between GEOPS and Kazakh Altyn, so that the obligation to pay an agency fee to Minerals Operating in respect of that contract did not arise. Reading the judgment as a whole, however, I think it clear that the Court considered and rejected for sound reasons GEOPS's case that the agreement had terminated on 8 March 2021.
6. The date of 8 March 2021 derives from a letter dated 5 March 2021 from GEOPS to Minerals Operating, following earlier correspondence about collaboration with regard to forthcoming projects. In substance two issues were raised. One concerned an argument by GEOPS that, as it was put in paragraph 22 of the Court's judgment, "the Claimant was offering to provide geological exploration by putting a price that was effectively reducing the value of the contract to the Defendant, was acting not as an Agent, but in competition with the Principal". The other was an allegation that Minerals Operating had threatened to commit violent acts against GEOPS's infrastructure and facilities and to harm its business activities in general. The letter ended with a request "to provide us with your written response to our call to cooperate not later than Monday, 8 March. Any other way of your response that is not in an official written form will not be considered by our side, and as such will be treated as your ultimate rejection of our proposal for cooperation and finally will open us doors to officially continue our business activities on our own". No response was received.
7. Even taken as its highest, it would be difficult to read that letter as an effective termination of the existing agency agreement between the parties. But in any event the Court dismissed both issues of concern raised in the letter (the judgment refers to a "letter of 15 March 2021", but this is plainly a typographical error for the letter of 5 March 2021). As to the alleged threats, the Court was "unable to find on the evidence that there were any" (paragraph 23 of the judgment), a finding that is not specifically challenged and would not be open to successful challenge. As to the offer relating to geological exploration, the Court accepted Minerals Operating's evidence that although it was at one stage offering to assist in geological exploration, there was never any agreement in relation to the price of geological services and in those circumstances it did not in fact become involved in the provision of such services: the Court held that "nothing about the Claimants merely offering to provide the services amounts to a breach of the agreement" and it was not necessary to consider a further issue, as to whether geological services would or should normally be regarded as part of a drilling contract, "because the offer did not eventuate, and it had no causative effect" (paragraph 24 of the judgment). The Court can therefore be seen to have rejected GEOPS's case that Minerals Operating had been in breach of its duties under the agency agreement, such as to justify termination of that agreement with effect from 8 March 2021. There was no other basis on which it might be said that the agency agreement was terminated prior to the conclusion of the contract between GEOPS and Kazakh Altyn, so as to deny Minerals Operating's entitlement to the agency fee in respect of that contract. An appeal against this aspect of the Court's judgment would in my view have no real prospect of success.

8. The Court did hold that the agency agreement broke down subsequently: “On one view, by failing to pay in accordance with the agreement, GEOPS had in effect repudiated the Agency agreement and Minerals Operating had no further obligations arising from that agreement .... [B]oth parties have plainly acted in such a way that is inconsistent with the continuation of the Agency agreement. And I consider they have no continuing obligations to each other” (paragraph 20 of the judgment). GEOPS does not dispute the findings that the agreement had ended and that the parties had no continuing obligations to each other, but complains about the lack of a finding as to the date of termination and the uncertainty that this creates. Had it been necessary to make such an express finding, the Court would plainly have favoured the date when GEOPS breached its obligation to pay the agency fee in respect of the Kazakh Altyn contract: see the passage just quoted, and the observations in paragraph 21 of the judgment to the effect that a “LinkedIn” post by Minerals Operating in December 2021 which was said to show competition on underground drilling work “was eight months after the non-performance by the Defendant of its own obligation by non-payment” and “if the Defendant was in breach of its own obligation by non-payment, I do not consider that the posting of this notice can possibly be regarded as a breach of the Agency agreement”. It was not necessary, however, for the Court to go further than it did. It was clear that the central question was Minerals Operating’s entitlement to an agency fee in respect of the contract with Kazakh Altyn and that there were in the circumstances no other concluded contracts to which the agency agreement was said to apply. Indeed, GEOPS’s counterclaim sought a finding of termination of the agreement but did not suggest that the date of termination had any wider practical significance if its case as to termination with effect from 8 March 2021 was rejected. Again, there is in my view no real prospect of a successful appeal in respect of the Court’s handling of this issue.
9. Accordingly, I take the view that an appeal would have no real prospect of success on any of the issues raised; nor is there some other compelling reason why an appeal should be heard. Permission to appeal is therefore refused.

By the Court,

The Rt Hon. Sir Stephen Richards,  
Justice, AIFC Court

**Representation:**

The Appellant/Defendant was represented by Ms. Gulnur Nurkeyeva, Partner, Grata International Law Firm, Beijing, People’s Republic of China.

The Respondent/Claimant was represented by Mr. Ravil Kassilgov, Partner, Tukulov & Kassilgov Litigation LLP, Almaty, Republic of Kazakhstan.



IN THE SMALL CLAIMS COURT  
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

5 April 2023

Case No: AIFC-C/SCC/2022/0025

PRIVATE COMPANY DOCUMENTOLOG GLOBAL LIMITED

Claimant

v.

LLP KOSTANAY METAL STRUCTURES PLANT

Defendant

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JUDGMENT

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Justice of the Court:

Charles Banner KC



### ORDER

1. The Claim is allowed.
2. The Defendant shall pay the Claimant the sum of 564,969.65 within 14 days of this Order.

### JUDGMENT

3. By this claim, the Claimant seeks to recover what it says are sums due by the Defendant under a contract dated 28<sup>th</sup> May 2021 ("**the Contract**") for what can broadly be summarised as the provision by the Claimant to the Defendant of information technology services.
4. The Claimant contends that the Defendant has failed to fulfil its obligations under the Contract to pay the Claimant KZT 874,733. The Claimant seeks to recover this sum, together with a surcharge of KZT 40,236.65 pursuant to Articles 293-298 of the Civil Code of the Republic of Kazakhstan and the terms of the Contract.
5. The law applicable under the contract is the law of the Republic of Kazakhstan. The Parties have agreed that any disputes under the contract may be decided by the AIFC Court.
6. The Claimant filed its Claim Form on 23<sup>rd</sup> December 2022. Under rule 28.12 of the AIFC Court Rules ("**the Rules**"), the Defendant was required, within 14 days, either to admit the claim by filing and serving an admission in accordance with Part 10 of the Rules, or file a Small Claim Defence, or make an application to dispute the jurisdiction of the Small Claims Court in accordance with Part 6 of the Rules. The Defendant did none of these things.
7. On 9<sup>th</sup> January, the Claimant applied for Default Judgment under Part 9 of the Rules. However, under Rule 28.7, Part 9 does not apply to proceedings in the Small Claims Court. The Court therefore does not have jurisdiction to determine the application for Default Judgement.
8. On 10<sup>th</sup> February 2023 the Defendant wrote to the Court stating that on 18<sup>th</sup> January 2023, it had paid the claimant KZT 350,000 towards the sums claimed. The Defendant concluded the letter by asking the Court "*not to fully recognize the claim, since we paid part of the amount owed*". The Court has also been provided with a Payment Order No. 28 dated 18<sup>th</sup> January 2023 evidencing the payment.
9. The Court is satisfied on the evidence that the Defendant has indeed paid the Claimant KZT 350,000 towards the sums claimed by the Claimant.
10. The Defendant has had every opportunity to dispute its liability to pay the remaining amount, but has not done so.
11. The Court therefore allows the Claim and requires the Defendant to pay the Claimant the sum of 564,969.65 within 14 days of the Court's order.





By the AIFC Small Claims Court,

Charles Banner, KC  
Justice, AIFC Small Claims Court

Representation:

The Claimant was represented by Ms. Ayan Kabenova, Leading Lawyer, Private Company Documentolog Global Limited.

The Defendant was represented by Mr. Sayasat Kubzhasarov, Deputy General Director, LLP Kostanay Metal Structures Plant.



IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

24 March 2023

CASE No: AIFC-C/SCC/2022/0024

Shanghai Construction Group Co. Ltd Kazakhstan Branch

Claimant

v.

TeksheTas Company LLP

Defendant

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JUDGMENT

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Justice of the Court:

Justice Charles Banner KC



## **ORDER**

- 1. The claim is allowed.**
- 2. The Defendant shall pay the Claimant the sum of 16,839,426 Tenge by 16:00 Astana time on 15 April 2023.**

## **JUDGMENT**

1. By this claim the Claimant, Shanghai Construction Group Co. Ltd Kazakhstan Branch, seeks an order requiring the Defendant, TeksheTas Company LLP, to pay damages amounting 16,839,426 Tenge pursuant to a contract between the parties dated 21 February 2020 for the supply of crushed stone. The amount claimed reflects what the Claimant says is the difference between sums it paid the Defendant under the contract until the end of 2021 and the amount of crushed stone delivered by the Defendant.
2. The claim was originally commenced on 29 November 2022 in the Specialised Interdistrict Economic Court of Astana. On 7 December 2022, the parties signed a Transfer of Cases Consent Form in which they agreed to terminate the proceedings in that court and transfer the case to the AIFC Court, if the AIFC Court were to accept the case.
3. By Order dated 23 December 2022, the Chief Justice of the AIFC Court, Rt. Hon. Lord Mance, held that the case was appropriate for transfer to and determination by the AIFC Court, and declared that the AIFC Court had jurisdiction of the case.
4. The value of the claim is below USD 150,000 and therefore the claim falls within the jurisdiction of the AIFC Small Claims Court: see Rule 28.2(1) of the AIFC Court Rules.
5. Following the Order of Chief Justice Lord Mance, the Claimant filed a claim form with the AIFC Court on 1 February 2023. In response, on 15 February 2023 the Defendant filed a document entitled 'Claim Admission' in which it confirmed that it does not contest the claim, subject to a request that, due to a difficult financial situation and the seasonal nature of its main activity, the deadline for payment of the sums claimed by the Claimant is not until 15 April 2023.
6. The Claimant has not commented on the Defendant's request in relation to the payment deadline.
7. Upon consideration of the papers in these proceedings, including those mentioned above, the Court is satisfied that the claim should be allowed. The Court orders the Defendant to pay the Claimant the sum of 16,839,426 Tenge. The deadline requested by the defendant of 15 April 2023 is slightly longer than the Court would ordinarily require, but given that it is only a fairly short extension and the Claimant has not objected to it, the Court will accede to this request in the circumstances of this case. In doing so, the Court has had regard to the Defendant's timely co-operation in these proceedings.



By Order of the Court,

Charles Banner KC,  
Justice, AIFC Court

Representation:

The Claimant was represented by Mr. Yuriy Kamaletdinov, an independent external lawyer, Astana, Kazakhstan.

The Defendant was represented by Mr. Rustem Zhanisbayev, financial director at TesheTas Company LLP, Astana, Kazakhstan.



IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

1 February 2023

CASE No: AIFC-C/CFI/2022/0020

FREEDOM FINANCE JSC

Claimant

v.

EGOR ROMANYUK

Defendant

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JUDGMENT

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Justice of the Court:

Justice Sir Rupert Jackson

## JUDGMENT

This judgment is in seven parts, namely:

Part 1. Introduction

Part 2. The facts

Part 3. The present proceedings

Part 4. Was the defendant in breach of contract?

Part 5. Kazakhstan law concerning damages and penalties

Part 6. To what remedy is the claimant entitled?

Part 7. Conclusion

### PART 1. INTRODUCTION

1.1 This is a claim for USD \$5 million, said to be due as liquidated damages for breach of a separation and release of claims agreement.

1.2 This case raises the question how to apply article 297 of the Civil Code in unusual circumstances.

1.3 The claimant, Freedom Finance JSC ('FFIN') is part of the Freedom Finance group of companies. Other companies in the group include Freedom Finance Belize ('FFBZ') and Freedom Holding Corporation ('FRHC'). Mr Timur Turlov is the ultimate beneficial owner of the group.

1.4 The defendant, Mr Egor Romanyuk, is experienced in asset management. He was employed as vice-president of the claimant from 4 March 2019 to 31 January 2020.

1.5 In this judgment I use the following abbreviations:

'Civil Code' means the Civil Code of the Republic of Kazakhstan.

'Civil Procedure Code' means the Civil Procedural Code of the Republic of Kazakhstan.

'SHEL' means Shaikenov Law Experts, a firm comprising Mr Arman Shaikenov and Mr Valikhan Shaikenov.

'SRCA' means the separation and release of claims agreement dated 1 February 2020.

'TKL' means Tukulov and Kassilgov Litigation, the law firm acting for the claimant.

1.6 There are two official versions of the Civil Code, one in Russian and one in Kazakh. I understand that the Russian version is more widely used, particularly in Astana and Almaty. The Kazakhstan Ministry of Justice has produced a helpful translation of the Kazakh Civil Code into English. I shall use this version, except in certain rare instances where there is an issue concerning the translation.

1.7 After these introductory remarks, I must now turn to the facts.

## PART 2. THE FACTS

2.1 When Mr Romanyuk's employment with FFIN came to an end, he and FFIN entered into the SRCA. Clause 6 of the SCRA required Mr Romanyuk to refrain from publishing confidential information received during his employment. Clause 7 of the SRCA provided:

"Non-Disparagement. The Employee agrees and covenants that the Employee shall not at any time make, publish or communicate to any person or entity or in any public forum any defamatory, maliciously false, or disparaging remarks, comments, or statements concerning any member of the Employer Beneficiary Group or its businesses, practices or activities, or any of its employees, officers, or directors and their existing and prospective customers, suppliers, investors, and other associated third parties, now or in the future."

2.2 Clause 9 of the SRCA provided:

"In the event of a material breach by the Employee of any of the provisions of this Agreement, the Employee hereby acknowledges and agrees that the Employer shall be entitled to seek, in addition to other available remedies, an award for liquidated damages in an amount equal to \$5,000,000 for each material breach (the "Liquidated Damages"). The parties acknowledge and agree that the employee's harm caused by a material breach would be impossible or very difficult to accurately estimate at the time of the breach and that the Liquidated Damages set forth herein is a reasonable estimate of the anticipated or actual harm that might arise from a material breach."

2.3. The consideration which FFIN agreed to pay under clause 3 of the SRCA, and duly paid, was USD \$100,000. As part of the separation package agreed between the Freedom Finance Group and Mr Romanyuk (although not mentioned in the SRCA), 300,000 shares of FRHC were transferred to Mr Romanyuk. These shares were worth approximately USD 4.8 million, as explained in paragraph 9 of Mr Turlov's witness statement and confirmed by the record of FHRC's share prices in March 2020. Mr Romanyuk stated in cross-examination that the shares transfer was compensation for something that had happened and also a reward for his services, as he had helped FFIN to get a listing on Nasdaq.

2.4. For the next two years all was peaceful between the parties. Mr Romanyuk and the Freedom Finance companies went their separate ways.

2.5. Unfortunately, on 18 April 2022, in a video-address to a large number of individuals connected with Freedom Finance Mr Turlov made the following comments about Mr Romanyuk:

"With varying success. He then came to work for us, worked in our Moscow office, somehow traded, gave a lot of advice on which clients lost a lot of money, and managed to quarrel with such a prominent part of our team unfortunately, and quarreled with some of our clients. He moved to Kazakhstan and roughly the same thing happened there. We had a conflict against the background of that, he always had a dream, a very long-standing dream. He had a dream of building a career as a whistleblower, a great whistleblower and activist investor, i.e., he wanted to sue companies; he wanted to expose them; he wanted to do some big deals; to engage in corporate blackmail; to get some big payoffs from companies so that they would pay him money for doing... or not digging or something else there. In general, this was sort of his key and main job. And so, he tried to do it there, tried to buy up some company, to make corners. There was the story of Revlon, which he was initially quite active in buying

up in order to set up a corner there. This, by the way, is pure manipulation under American law. If he had succeeded, it could have been the subject of an investigation by the SEC just as creating corners, which is directly prohibited. You cannot buy up a company's stock just to jack up the price and get those who shorted it there. Unfortunately, if you read the law on manipulation, you will see it there. The problem we had was that the shares he was buying were shorted by a number of our other clients."

- 2.6. Mr Romanyuk learnt what Mr Turlov had been saying and was given a copy of part of the video-recording. He was understandably most displeased.
- 2.7. Mr Romanyuk started posting highly critical comments about Mr Turlov and the Freedom Finance companies on Instagram and Twitter. Mr Turlov maintains that those critical comments are not well-founded but that, if they enter the public domain, they could be extremely damaging to his business. I shall not therefore set those comments out in this judgment. However, anyone involved in this case, or dealing with an appeal from this judgment, will be able to read all Mr Romanyuk's posts in the court bundle.
- 2.8. Relations between Mr Turlov and Mr Romanyuk deteriorated badly during 2022. Each man made complaints about the other to relevant authorities. These matters are for those authorities to investigate or not, as they see fit. They are not matters for this court to inquire into. Suffice it to say that these proceedings seem to be part of a wider war being waged between Mr Turlov and Mr Romanyuk.
- 2.9. Mr Turlov took strong exception to Mr Romanyuk's posts on Twitter and Instagram. He considered them to be flagrant breaches of the SRCA. He therefore commenced the present proceedings.

### PART 3. THE PRESENT PROCEEDINGS

- 3.1 By a claim form issued in the AIFC Court on 11 August 2022, FFIN contended that Mr Romanyuk had committed breaches of clauses 6 and 7 of the SRCA. Accordingly, FFIN claimed USD \$5 million as liquidated damages due pursuant to clause 9 of the SRCA. FFIN applied in its claim form for the proceedings to be heard in private.
- 3.2 Mr Bernar Alikhan, a junior associate at TKL, had the task of serving the proceedings. On 19 September 2022 at 10.21 am he telephoned Mr Romanyuk and asked for his address. Mr Romanyuk refused to provide it. Mr Alikhan made other attempts to contact Mr Romanyuk by telephone, text message and email, but was unable to elicit any response. In those circumstances, Mr Alikhan effected service at the address for service specified in the SRCA. After service had been effected at the designated address, Mr Romanyuk failed either to acknowledge service or to serve a defence.
- 3.3 FFIN applied for judgment in default. I dealt with this application at a remote hearing on 10 October 2022. I gave judgment for the claimant on liability, leaving the remedy to be determined at a later hearing. In the course of the judgment I said:

"The claimant is entitled to judgment in default, but I have a concern as to whether the claimant is entitled to recover the full \$5 million specified in clause 9 of the agreement. If this case were proceeding under English law, it would be necessary to decide whether that provision was an unenforceable penalty. The present contract, however, is subject to Kazakhstan law.



In a case where the penalty is excessively large compared to the losses of the creditor, Article 297 of the Kazakhstan Civil Code enables the court to reduce the amount of a penalty “considering ... the interests of the debtor and the creditor that deserve attention”. It is impossible to tell on the basis of the documents before the court whether it is appropriate to exercise that power in the present case.

...

There must be a hearing to determine the amount of damages due. This may turn out to be \$5 million or some lesser sum. As a preliminary step, there must be a directions hearing by video-link. One problem which we must consider at the directions hearing is the fact that there will probably be only one party before the court at the hearing of the assessment of damages. The issue is quite a difficult one, which requires argument on both sides. I request assistance from the claimant’s counsel and from the Registrar as to whether the court can engage an amicus curiae to assist at the hearing of the assessment of damages”.

3.4 Following that hearing, the Registrar approached Mr Sergei Vataev, a distinguished and experienced Kazakhstan lawyer. Mr Vataev kindly agreed to act as amicus curiae in this case, and to do so for no fee. I am extremely grateful to Mr Vataev for doing this and for the considerable assistance which he has provided to the court, both before and during the trial.

3.5 On 2nd November 2022 there was a remote case management conference, at which I gave directions leading up to the trial. Paragraph 2 of the directions order dated 2 November 2022 stated:

“Mr. Sergei Vataev will attend the trial as amicus curiae and will assist the Court in the capacity of an independent advocate. Mr. Vataev will file at the Registry in English language a short report by 6pm Astana time on Friday 6 January 2023 dealing with whether the Court can and should reduce damages below US \$5 million pursuant to Article 297 of the Civil Code of the Republic of Kazakhstan or any other relevant provision. Mr. Vataev will in the same report verify independently any weight to be given to the case authorities from the national courts of the Republic of Kazakhstan relied upon in any statistical research to be filed at the Registry by the Claimant’s Counsel.”

3.6 On 15 December 2022 Mr Romanyuk came onto the scene. He contacted the court by email, expressing his dismay at the judgment in default and claiming to have been unaware of the proceedings. I do not accept those protestations. Having heard Mr Tukulov’s skillful cross-examination of Mr Romanyuk, I am satisfied that Mr Romanyuk was well aware of these proceedings and deliberately avoided service. His non-participation before 15 December 2022 was a deliberate strategy, which he came to regret at a late stage.

3.7 On 20 December 2022 the court ordered that any application by Mr Romanyuk to set aside judgment would be dealt with at the hearing already fixed for Monday 16 January 2023. The court ordered that the full trial would follow immediately on 16 January, if the application to set aside succeeded.

3.8 On 26 December 2022 Mr Romanyuk lodged an application (headed ‘Petition’) to set aside the judgment in default pursuant to rules 9.18 to 9.20 of the AIFC Court Rules. On the same day Mr Romanyuk lodged a document headed ‘Objection’, which was in effect both his witness statement and his defence to the claim. He specifically requested that the hearing of the proceedings should take place in open court, not in private as the claimant had proposed. Mr Romanyuk made no objection to the hearing date which had been fixed (namely, 16 January 2023).

- 3.9 On Tuesday 10 January 2023 the defendant applied for an order that the hearing fixed for Monday 16 January should proceed by video link. Again, the defendant made no objection to the hearing date which had been fixed. In response, on 12 January 2023, the court directed that the defendant may participate by video link but his lawyers must attend in person.
- 3.10 At 20.47 on the evening of Friday 13 January the defendant applied to the court to adjourn the hearing which was due to take place on Monday 16 January. The principal ground of his application was that he was unable to issue powers of attorney for his legal representatives (who are based in Moscow) to act for him.
- 3.11 The Court rejected that application principally because:
- (i) The defendant had had ample opportunity to issue a power of attorney for his Moscow lawyers.
  - (ii) The defendant had delayed issuing his application to postpone the hearing until an extremely late stage. He should have made this application in December, if he really needed more time.
- 3.12 The hearing duly took place on Monday 16 January. Mr Tukulov of TKL appeared for the claimant. Mr Kholod of Assistent Plus, a firm of Moscow lawyers, appeared for the defendant. After hearing brief argument, I made an order setting aside the judgment in default pursuant to rule 9.19 of the AIFC Court Rules. The trial then proceeded. Mr Turlov attended in person and gave evidence. Mr Romanyuk attended remotely from Dubai (where he now lives) and gave evidence.
- 3.13 In relation to the legal issues, Mr Bernar of TKL provided a witness statement setting out a statistical analysis of judicial decisions on article 297 of the Civil Code. SHEL (instructed by TKL) provided a report on the law of Kazakhstan concerning penalties and related issues. Mr Vataev (as amicus curiae instructed by the Court) submitted a paper addressing the issues identified in paragraph 2 of the directions order dated 2 November 2022. I have found all this legal material to be of considerable assistance.
- 3.14 After considering the claimant's application and the defendant's objection, I was not prepared to order that the trial take place in private. However, I appreciate that Mr Turlov does not want Mr Romanyuk's various posts (which are no longer extant) to be given any wider publicity. The correctness of those posts is strongly disputed by Mr Turlov and has not been adjudicated upon by this court. I shall therefore refrain from setting out the text of those posts, but will refer to them by reference to paragraph numbers in the claim form. Also, I have made an order banning the publication of certain documents on the court file.
- 3.15 Mr Romanyuk strongly disputes the accuracy of the comments which Mr Turlov made about him in the video recording referred to in Part 2 of this judgment. However, Mr Romanyuk has no concerns about those comments being quoted in this judgment. Indeed, they are the foundation of his defence to the present claim.
- 3.16 Having outlined the course of the proceedings, I must now address the issue of liability for breach of contract.

#### PART 4. WAS THE DEFENDANT IN BREACH OF CONTRACT?

4.1 The defendant contends that the SRCA was presented to him on a take it or leave it basis. If he wanted to receive the transfer of shares and the \$100,000, he would need to sign the agreement. Mr Kholod submitted in his opening speech that the agreement was invalidated pursuant to article 159.9 of the Civil Code.

4.2. Article 159.9 provides:

“A transaction which is entered into under the influence of fraud, violence, or threat, and also a transaction that the person was compelled to enter into as a result of a combination of difficult circumstances and on conditions extremely unprofitable for himself (herself) which was exploited by the other party (shackling agreement), may be recognized by the court as invalid upon the action of the victim.”

4.3. I do not accept that article 159.9 has any application in this case. The SRCA was a contract made between two experienced businessmen. Each had access to legal advice. The deal may have been presented on a take-it-or-leave-it basis, but that did not amount to oppression or exploitation. If Mr Romanyuk did not wish to sign, he did not need to do so. He could have pursued his claims for remuneration and for compensation in respect of any past wrongdoing (if there was any) by litigating in this court or, if he preferred, through the other Kazakhstan courts.

4.4. I now turn to the posts which are identified in the claim form. In order to ensure fairness to the defendant (whose lawyers have had limited time to prepare) I shall disregard other posts mentioned at trial but not referred to in the pleadings. Those other posts do not add materially to the claimant's case. Mr Kholod presented the defence case entirely by reference to the posts which are identified in the pleadings.

4.5. Only one post is alleged to amount to a breach of the duty of confidentiality contained in clause 6 of the SRCA. That post is pleaded in paragraph 10 of the claim form. The passage in brackets is not a breach of confidentiality. The fact that FFIN was 100% owned by Mr Turlov was a matter within the public domain. The comment about the dealings between FFIN and FFRC went beyond matters which were public knowledge. It was Mr Romanyuk's “estimate” based at least in part on what he had learnt during his employment. That employment had ended 28 months previously, so the estimate was unlikely to be accurate. This was only a modest breach of clause 6.

4.6. Was that a “material breach” within the meaning of clause 9 of the SRCA? Article 401.2 of the Civil Code provides:

“A violation of the agreement by one of the parties shall be deemed material if it entails for the other party such damage that it to a substantial degree loses something on which it had the right to count when concluding the agreement.”

4.7. I understand from Mr Vataev that this is the only definition of “material breach” in the general part of the Civil Code and it is widely used by Kazakhstan lawyers. There are other definitions of “material breach” in Section 4 of the Code (starting at article 406) but that section is concerned with special categories of contract (sale, employment etc) and so is not relevant for present purposes.

- 4.8. Bearing in mind the extent of the information about the Freedom Finance Group which was in the public domain, I do not consider that the breach of clause 6 identified in paragraph 10 of the claim form constituted a material breach of contract. Therefore, that did not trigger clause 9 of the contract.
- 4.9. The claimant's primary case is based upon breach of clause 7, the non-disparagement clause. The claimant contends that the posts identified in paragraphs 10, 12, 13, 14, 15 and 16 of the claim form constituted disparagement of the Freedom Finance Group and persons connected with those companies contrary to clause 7 of the SRCA.
- 4.10. Mr Romanyuk accepts that he was responsible for those posts, although he points out that they automatically disappeared after 24 hours. He also contends that the court must look at the complete posts in order to appreciate the contexts, not just the limited extracts which are quoted. Those are both good points. I bear in mind the limited duration of the posts and I read them in their full contexts.
- 4.11. Mr Tukulov in his opening speech emphasised that "disparaging remarks" is a mild term. A remark may be disparaging, even if it is not a defamatory statement. That too is a good point and I take it into account.
- 4.12. Mr Kholod urges upon the court that many of the posts complained of are mere statements of Mr Romanyuk's opinion, which others may not share. They are, so to speak, fair comments which Romanyuk was entitled to express without committing any disparagement. I accept that some posts were statements of Mr Romanyuk's opinion. Nevertheless, as Mr Tukulov submitted, that does not prevent them also constituting disparagement.
- 4.13. Mr Kholod points out that all of the posts complained of post-date Mr Turlov's video address on 28 April 2022. This contained extremely harsh comments about Mr Romanyuk. It was widely viewed and, unlike Mr Romanyuk's posts, it was not time-limited. It was sent to all employees of FFIN.
- 4.14. Furthermore, says Mr Kholod, during the period when Mr Romanyuk was posting the relevant comments, Freedom Finance people were continuing to make highly damaging comments about Mr Romanyuk. Mr Romanyuk said in his oral evidence that these comments were reported to him. I accept that evidence because it is corroborated in two respects. First, Mr Turlov recalls making a video film strongly criticising Mr Romanyuk in July 2022. Secondly, under cross-examination Mr Turlov admitted that he may have told his personnel that Mr Romanyuk was running corporate blackmail and stock manipulation.
- 4.15. Mr Kholod submitted in his opening speech that the posts were really a means of defence against Mr Turlov, not attack. In that connection, Mr Kholod places reliance upon article 143 of the Civil Code. That provides:
- "1. Through the court a citizen or a legal entity shall have the right to refutation of information which damages his (her) honor, dignity or business reputation, unless the one who spreads such information proves that the information is true.
2. Where the information that damages the honor, dignity or business reputation of a citizen or a legal entity is spread through the mass media, that information must be refuted by the same mass media without any charge imposed the aforementioned citizen or legal entity.

In the case where specified information is contained in a document issued by an organization, such a document shall be subject to replacement or annulment with the obligatory communication to the addressees of the inconsistency of the information contained in that document.

The procedure for refutation in other cases shall be established by the court.

3. A citizen or a legal entity with regard to which the mass media published information which restricts his rights or legitimate interests, shall have the right to publish their response in the same mass media free of any charge.”

- 4.16. Mr Tukulov submits that article 143 of the Code is irrelevant in a case where there is a contract such as the contract in the present case. I agree that article 143 is not strictly relevant. First, Mr Turlov’s video, though seen by numerous employees, did not constitute ‘mass media’. Secondly, Mr Romanyuk’s posts did not specifically address Mr Turlov’s criticisms and say why those criticisms were unfounded. Instead they were counter-attacks on Mr Turlov’s conduct. On the other hand article 143 enshrines a general principle, which is that persons are entitled to respond to attacks upon them. I shall bear that in mind when I come to consider the question of remedy.
- 4.17. I have carefully reviewed the competing arguments. I have come to the conclusion that each of the posts identified in the claim form constituted disparagement of Mr Turlov or the Freedom Finance companies or persons associated with those companies. I reach this conclusion for four reasons:
- (i) Mr Tukulov is correct in his submission that ‘disparage’ is a fairly mild term and does not involve unduly harsh criticism.
  - (ii) In fact the criticisms contained in the various posts were extremely harsh, even when read in context and even bearing in mind all the caveats to which Mr Romanyuk draws attention.
  - (iii) The fact that the posts were short-lived does not exculpate Mr Romanyuk. They had the character of being disparaging and they were seen by numerous people during their short periods of existence in cyberspace.
  - (iv) The fact that Mr Romanyuk was responding to damaging criticisms of himself being voiced by Mr Turlov and his associates is no defence. There is no proviso in clause 7 along the lines “except when responding to criticisms expressed by Mr Turlov or other persons within the Freedom Finance Group”. Article 143 of the Civil Code is not directly applicable. So that article does not provide a defence on liability, although it will be relevant when I come to consider remedy.
- 4.18. I therefore reject the various defences advanced, and hold that Mr Romanyuk acted in breach of clause 7 of the SRCA on each of the occasions pleaded in paragraphs 10, 12, 13, 14, 15 and 16 of the claim form. Having found in favour of the claimant on liability, I must now turn to the question of remedy. As a first stage in that exercise, I must review Kazakhstan law concerning damages and penalties.

## PART 5. KAZAKHSTAN LAW CONCERNING DAMAGES AND PENALTIES

- 5.1 Chapter 20 of the Civil Code (articles 349 – 366) deals with liability for violation of an obligation. Within that chapter, article 350 states the general principle that “A debtor who violated an obligation shall be obliged to compensate the creditor for any losses caused by the violation.” Breach of contract is one

form violation of an obligation. So the general rule in Kazakhstan, as in England, is that a contract breaker must compensate the other party for losses caused by the breach.

5.2 Chapter 18 of the Civil Code (articles 292 – 338-4) deals with securing execution of obligations. Paragraph 2 of chapter 18 (articles 293-298) deals with penalties.

5.3 Article 293 defines ‘penalty’. The English version of article 293 reads as follows:

“Article 293. The definition of forfeit

Damages (fine, penalty) shall be recognized as a monetary amount defined by legislation or agreement, which must be paid by a debtor to the creditor in the case of failure to execute, or improper execution of an obligation, in particular, in the case of a delay in execution. Upon the claim to pay the damages, the creditor shall not be obliged to prove losses caused to him.”

5.4 That translation is not entirely correct. I therefore set out the Russian version as well:

“Статья 293. Понятие неустойки

Неустойкой (штрафом, пеней) признается определенная законодательством или договором денежная сумма, которую должник обязан уплатить кредитору в случае неисполнения или ненадлежащего исполнения обязательства, в частности в случае просрочки исполнения. По требованию об уплате неустойки кредитор не обязан доказывать причинение ему убытков”

5.5 The opening word of article 293 ‘Неустойкой’ does not mean ‘damages’ as the translation suggests. It means ‘penalty’. The two words in brackets after it (‘штрафом’ and ‘пеней’) make it plain that the provision is talking about all kinds of penalties, both specified sums and sums which vary according to the length of delay or the incompleteness of performance.

5.6 The primary purpose of a penalty under Kazakh law is to deter and/or punish breaches of contract. SHEL aptly describe this as a coercive function. So a penalty clause may (but need not) impose a liability greater than the likely amount of loss caused by the breach. This is different from English law, which disallows such contract provisions on policy grounds.

5.7 Article 351 of the Civil Code deals with the relationship between penalty and damages. Again, there is a translation issue. I shall therefore set out both the English and Russian versions.

5.8 The English version reads:

“Article 351. Losses and Forfeit

1. When a forfeit is established for a failure to execute, or for improper execution of an obligation, then the losses shall be compensated for the part which is not covered by the forfeit. Legislation or the agreement may stipulate the cases: where it is permitted to claim only forfeit. but not losses; where losses may be levied in full amount in addition to damages; and where at the discretion of the creditor either damages or losses may be claimed.

Legislative acts of the Republic of Kazakhstan or the contract may provide for the cases: when losses may be recovered in full amount in excess of the penalty; when at the choice of the creditor either a penalty or losses may be recovered.

Cases, in which, a penalty only may be established for failure to perform or improper performance of an obligation, shall be determined by legislative acts of the Republic of Kazakhstan.

2. In the cases where for failure to execute or improper execution of an obligation a limited liability is established, the losses which are subject to compensation in the part which is not covered by the forfeit. or in addition to it or instead of it, may be claimed up to the limits established by such limitation.”

#### 5.9 The Russian version reads:

“Статья 351. Убытки и неустойка

1. Если за неисполнение или ненадлежащее исполнение обязательства установлена неустойка, то убытки возмещаются в части, не покрытой неустойкой.

Законодательными актами Республики Казахстан или договором могут быть предусмотрены случаи: когда убытки могут быть взысканы в полной сумме сверх неустойки; когда по выбору кредитора могут быть взысканы либо неустойка, либо убытки.

Случаи, при которых за неисполнение или ненадлежащее исполнение обязательства может устанавливаться только неустойка, определяются законодательными актами Республики Казахстан.

2. В случаях, когда за неисполнение или ненадлежащее исполнение обязательства установлена ограниченная ответственность, убытки, подлежащие возмещению в части, не покрытой неустойкой, либо сверх, либо вместо нее, могут быть взысканы до пределов, установленных таким ограничением.”

#### 5.10 It can be seen from the third word of the heading and from the third word of article 351.1 that this provision is using the generic term for penalty. It is talking about all forms of penalty identified in article 293.

#### 5.11 Mr Vataev explained during the hearing that under Kazakh law penalties have a dual function. In addition to deterring and punishing, a penalty also provides compensation for the creditor. But a penalty (unlike liquidated damages in English law) is not directly related to the likely amount of the creditor’s loss. The effect of article 351 is that sometimes the creditor can recover both the penalty and compensation for losses not covered by the penalty.

#### 5.12 I now come now to article 297. This provides:

“If the penalty (fine, fee) to be paid is excessively large as compared to the losses of the creditor, the court, at the request of the debtor, shall have the right to reduce the penalty (fine, fee), considering the degree of fulfilment of the obligation by the debtor and the interests of the debtor and creditor that deserve attention.”



5.13 Mr Vataev explains in paragraph 16 of his paper that the words “at the request of the debtor” did not appear in the original version of article 297. They were added by Law of the Republic of Kazakhstan No. 49-VI dated 27 February 2017, which came into effect on 9 March 2017. The Parliament of Kazakhstan produced an explanatory note setting out the purpose of this law. In relation to the amendment of article 297, the explanatory note states:

“This suggestion is aimed at excluding the right of the court at its own discretion, that is, without a corresponding petition from the debtor, to reduce the penalty.”

5.14 Mr Alikhan Bernar has carried out a statistical analysis of judicial decisions on article 297. He has produced a table of 85 relevant cases. The court generally did not make a reduction unless asked to do so. Most cases related to delay by the debtor. The court sometimes reduced the delay interest, for example where the claimant delayed filing the claim.

5.15 In his Amicus brief Mr Vataev states:

“18. The courts actively used their right of judicial discretion that was given to them by Article 297. The courts very often chose to reduce the penalty amounts, especially when the amounts of accrued penalties were comparable with the amounts of the principal claims.

19. After the amendment of 2017, the practice started to change. The courts began addressing the issue of reducing the penalty amounts only if defendants requested the reduction. In those cases, in which no request for reduction of the penalty was raised, the courts cannot rely on any legal grounds to even consider the possibility of reducing the penalty amount and therefore do not address the reduction issue.

20. From time to time the Supreme Court of Kazakhstan based on its examination of cases and controversial issues of law issues its acts, so-called “Normative Resolutions,” which have the force of law and are mandatory guidelines for the courts and general public as to how certain provisions of the law should be interpreted and applied.

21. However, no Normative Resolution was ever issued in relation to Article 297, and there is no other guidance or recommendations relating to Article 297 as to, for example, what ratio of penalties and principal amounts should be viewed as “excessively large”, or which interests of the parties deserve attention.

20. Therefore, the courts exercise their discretion in deciding cases based on common sense and rational considerations.

...

32. I summarize my observations of the judicial practice of applying Article 297 as follows.

33. The courts typically exercise a formal approach, strictly following the letter of law, and do not reduce the amounts of penalties without the defendants’ request for reduction.

34. At the same time, if a request for the reduction of the penalty is made, the courts often exercise a “sympathetic” attitude and reduce the penalty, especially if its size is not commensurate to the actual



damages. Such attitude is characteristic in cases involving ordinary unsophisticated individuals sued by large legal entities, such as banks. Typically the penalty awarded by courts after the reduction represents some fraction of the principal amount, and rarely the court views the penalty, which is equal to or exceeds the principal amount, as appropriate.

35. However, this approach is more typical for situations with “floating” penalty amounts, where the penalty amount accrues over time and may grow to amounts equal to or exceeding the principal debt. In situations with fixed amounts of penalty, as established by the parties at the outset, the courts are less inclined to reduce the penalty.”

5.16 I bear in mind those principles when addressing the issues in this case. Mr Vataev also discusses article 364 of the Civil Code, which enables the court to reduce the amount of a debtor’s liability. In this case, however, neither party places reliance on article 364.

5.17 Having outlined the law on damages and penalties, I must now consider the remedy to which the claimant is entitled.

#### PART 6. TO WHAT REMEDY IS THE CLAIMANT ENTITLED?

6.1 In his closing speech, Mr Tukulov argued that the claimant should recover USD \$5 million, the full amount specified in clause 9 of the SRCA. In response Mr Kholod submitted that, if his client is liable for breach of contract, the court should reduce the amount payable pursuant to article 297 of the Civil Code to a sum no greater than USD \$100,000.

6.2 The first problem which I face is how to interpret clause 9 of the SRCA. This provides for “liquidated damages”, which is a common law concept unknown to Kazakh law. See Mr Vataev’s paper paragraph 48 and SHEL’s report paragraphs 27 and 45. In paragraph 44 of their report SHEL comment, with good reason, that clause 9 is poorly worded and self-contradictory.

6.3 Clause 9 is clearly intended to provide for a penalty in the form of a defined lump sum. Both SHEL and Mr Vataev have reached this conclusion and I agree with them. The possible breaches of the SRCA are numerous and highly variable. Despite what clause 9 of the SRCA says, USD \$5 million cannot possibly be a genuine pre-estimate of the losses likely to be caused by a breach. It is impossible to calculate a single figure which would cover all situations. The figure of \$5 million is much larger than the loss likely to be caused by a breach.

6.4 The reason for including such a large figure was to deter Mr Romanyuk from speaking out. Mr Turlov explained in paragraph 8 of his witness statement that the transfer of valuable shares and the payment of \$100,000 were intended to prevent Mr Romanyuk from making damaging statements about Freedom Finance. In other words, clause 9 specified a substantial penalty as a deterrent. That is perfectly legitimate under Kazakh law. Mr Romanyuk said much the same as Mr Turlov in his oral evidence. He was offered the whole deal as a package, on a take-it-or-leave-it basis. If he wanted to receive the valuable transfer of shares plus the \$100,000, he would have to sign the contract which banned him from making disparaging comments. I interject to add that where a contractual term is difficult to construe (as here) it is legitimate under article 392 of the Civil Code to have regard to pre-contract negotiations and other evidence of the parties’ intentions.

- 6.5 Mr Romanyuk was quite content at the time with the package which was offered to him. He took the shares and the cash payment. He faithfully kept to his side of the bargain. Mr Romanyuk made no public criticisms of Mr Turlov or the Freedom Finance companies.
- 6.6 Unfortunately, the arrangement started unravel just over two years later. Mr Turlov began to publicise bitter attacks on Mr Romanyuk's character and conduct. It is clear to me from the written and oral evidence that each man holds the other in extremely low esteem. That Mr Romanyuk should remain silent while Mr Turlov and his associates publicly blackened Mr Romanyuk's character was too much to expect.
- 6.7 The SRCA did not contain any provision banning Mr Turlov from making disparaging remarks about Mr Romanyuk. Nor can such a term be implied into the contract. On the other hand, both Mr Turlov and the Freedom Finance companies were under a duty to act in good faith.
- 6.8 Article 8 of the Civil Code is an important provision, which Mr Tukulov quotes in his written opening submissions. It provides:
- “4. Citizens and legal entities must act in good faith, reasonably and fairly when exercising their rights, and comply with the requirements contained in legislation and the moral principles of the society. Entrepreneurs must also comply with the rules of business ethics. This obligation may not be excluded or restricted by any agreement. The good faith, reasonableness and fairness of the acts of participants in civil rights relations shall be presumed.
5. Actions of citizens and legal entities aimed at causing harm to another person, abuse of the right in other forms, as well as the exercise of the right in contradiction with its purpose are not allowed.
6. No one has the right to take advantage of his/her bad faith behavior.
7. In case of non-compliance with the requirements provided for in paragraphs 3 - 6 of this article, the court may refuse to protect the right belonging to the person.”
- 6.9 In my view, Mr Turlov was acting in bad faith by using the SRCA to muzzle Mr Romanyuk, while at the same time publicising vituperative attacks on Romanyuk and causing others to repeat such attacks.
- 6.10 I come now to article 297 of the Civil Code. The penalty specified in clause 9 of the contract is excessively large in comparison with any losses caused by Mr Romanyuk's breaches. I take into account (as article 297 invites me to do) the fact that Mr Romanyuk fulfilled his contractual obligations for 25 months. He would have continued to do so, if he had not been provoked. I accept that Mr Turlov and FFIN committed no breach of the SRCA. On the other hand, they acted in bad faith and they created a situation which was highly likely to cause Mr Romanyuk to act in breach of contract.
- 6.11 In these circumstances, the court has two different tools available. Article 8.7 of the Civil Code entitles the court to refuse to protect the claimant's rights. Alternatively, article 297 enables the court to reduce the amount of the penalty
- 6.12 I have come to the conclusion that I should not deprive the claimant altogether of the penalty for which clause 9 of the SRCA provides. That would be a disproportionate step for the court to take.

6.13 The appropriate course for the court to take is to exercise its powers under article 297 of the Civil Code. I bear in mind all that Mr Vataev has said about the way in which courts generally exercise their powers under article 297. In particular, he states in paragraph 20 of his paper that, in the absence of any Normative Resolution, courts exercise this discretion “based on common sense and rational considerations”.

6.14 The facts of this case are most unusual. Fortunately. The provisions of Civil Code provide sufficient flexibility to enable the court to do justice between the parties. The appropriate order in all the circumstances is to reduce the penalty payable to USD \$100,000, pursuant to article 297.

#### PART 7. CONCLUSION

7.1 I thank counsel on both sides, Mr Tukulov and Mr Kholod, for their excellent advocacy and for presenting their respective cases so clearly.

7.2 For the reasons set out above, THE COURT ORDERS THE DEFENDANT TO PAY TO THE CLAIMANT A PENALTY OF USD \$100,000 WITHIN 28 DAYS FROM TODAY.

By Order of the Court,

Sir Rupert Jackson,  
Justice, AIFC Court

#### Representation:

The Claimant was represented by Mr. Bakhyt Tukulov, Tukulov & Kassilgov Litigation LLP, Almaty, Republic of Kazakhstan.

The Defendant was represented by Mr. Alexey Kholod, “Assistent Plus” International Law Firm, Moscow, Russian Federation.

IN THE SMALL CLAIMS COURT  
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

23 October 2023

Hearing dates: 2- 3 October 2023

CASE No: AIFC-C/SCC/2022/0018

“ASTANA MEDICAL UNIVERSITY” NON-PROFIT JSC

v

Claimant

“ADAM AND AHMAD MARKETING CONSULTING” COMPANY

Defendant

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JUDGMENT AND ORDER

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Justice of the Court:  
Justice Tom Montagu-Smith KC



## **ORDER**

- 1. The claim is dismissed.**
- 2. There shall be judgment for the Defendant on the counterclaim.**
- 3. By 18:00 Astana time on Monday 6 November 2023, the Claimant shall pay the Defendant the sums of US\$ 66,935.87 and KZT 49,914,041.**

## JUDGMENT

1. This claim arises out of a contract for the provision of services to the Astana Medical University (*"the University"*).
2. The Defendant (*"the Company"*) is a company established in Jordan. It provides services to the secondary education system.
3. On 19 May 2021, the parties entered into an agreement (*"the Contract"*). Under its terms, the Company was granted the exclusive right to attract students to the University from various jurisdictions, including Egypt, Jordan, Iraq, Morocco and Palestine. The Company was obliged to take certain steps to that end, including engaging in advertising and assisting the University in gaining accreditation in the target jurisdictions. In return, the Company was entitled to retain 25% of the tuition fees for the students.
4. The University claims that the Company comprehensively failed in its duties. In addition, the University says, the Company unjustifiably retained 25% of the tuition fees of students who transferred into the University from the Kazakh Medical University of Continuing Education (*"KazMUCE"*) and failed to pay for those students to receive tuition to catch up on their courses immediately after their transfer. The University claims reimbursement of certain amounts for tuition fees. In the course of the trial, however, the University's deputy chief accountant confirmed that nothing is now owed in respect of the students. While the University did not abandon its money claim, its primary claim is for termination of the Contract.
5. The Company's position is that the transferring students fell within the Contract and so the Company was entitled to 25% of the fees. The University has demanded payment from the students and the Company has had to reimburse them. The Company therefore claims those sums from the University. It also claims certain sums which it overpaid for tuition in 2021 – 2022 and a payment it made under protest for catch up tuition. The Company is content for the Contract to be terminated. However, it says it should be paid what is due to date, together with its 25% of the tuition fees for the existing cohort of Jordanian students until the completion of their studies.
6. The trial of the claim took place on 2 and 3 October 2023. The University was represented by Mr Serik Kuzhamkulov. The Company was represented by Ms Ardak Khabiyeva. I am grateful to them both for their assistance.

### The evidence

7. I heard from 6 witnesses in the course of the trial.
8. Two of the University's witness statements were served extremely late. The statements were due in July 2023. While the University served one statement on 1 August 2023, the other two arrived very shortly before trial, on Friday 29 September 2023 and on the first morning of trial itself, 2 October 2023. At the start of the trial, the University applied for permission to adduce evidence from the two new witnesses.
9. The University provided no good explanation for the failure to comply with the Court's Order, saying only that the witnesses had been on holiday at the relevant time. That does not, with respect, come close to amounting to a good reason for such extensive delay.

10. Ordinarily, I would be extremely cautious about permitting last minute evidence in this way. On behalf of the Company, however, Ms Khabiyeva indicated that she could deal with the evidence. The parties also indicated that they would be able to extend the trial into a second day. I therefore proceeded on the basis that I would allow the witnesses to give evidence and would decide later whether to take it into account, having regard to whether its admission caused unfairness to the Company or disrupted the hearing.
11. In the end, we were able to complete the evidence on 2 October 2023 and resume the hearing on 3 October for closing speeches. Ultimately, there were relatively few real disputes of fact. Some difficulties were encountered because it was not possible to show the documents to the witnesses. However, I did not consider that this caused any significant prejudice to the Company. The evidence of one of the University's new witnesses, its accountant, was helpful to the Company's case in that she confirmed that all but one of the students was up to date on tuition. In the circumstances, I have had regard to the evidence of all of the witnesses in reaching my conclusions.
12. I would not however wish that to be taken as an indication that evidence produced so late in the day will be permitted in every case. It will not. The introduction of new witnesses so soon before trial risks significant disruption and can often only fairly be accommodated if the trial is adjourned. That is an order of last resort and not one that would be likely to be justified by the sort of explanation provided by the University in this case.
13. The University relied on three witnesses:
  - a. Ms Abushakhamanova is the head of the University's Legal Support Department. She has been with the University since October 2022 and in her current role since March 2023. Her evidence was clear and she was in my view trying to assist the Court, but her evidence was of limited relevance. In particular, she was not employed by the University when the contract between the parties was agreed;
  - b. Ms Mahanova is the deputy chief accountant of the University. She gave evidence about the sums which the Company had paid for the students' education. Ms Mahanova confirmed that, of the students concerned, only one had any fees outstanding. The sums due for their tuition had, she said, been paid in full, including the sums demanded in respect of catch up tuition. In some respects, as I explain below, Ms Mahanova's evidence was contradicted by documents. I do not consider that this reflects badly on her approach to giving evidence. Given her late introduction, it was not possible to show her the documents in the course of her questioning. I found her to be an honest witness who was trying to assist;
  - c. Mr Bakhtiyor Marajapov has been employed by the University since November 2021. He was the acting director of internal administration until 5 January 2022 and supervised the legal service within the University. In some respects, I consider Mr Marajapov's evidence to be inconsistent with the contemporaneous documents, in particular on the issue of whether the transferred students fell within the terms of the Contract. In part, this may be due to the fact that he was not employed by the University at the relevant time. On those occasions, the documents were a more reliable guide. Ultimately, the only real area of factual dispute on which Mr Marajapov could give direct evidence concerned statements made in a meeting between the parties in early 2022. These were of relatively limited significance.

14. Mr Marajapov's witness statement was served on the morning of trial. In English translation, it appeared to accuse the Company of dishonesty and deceit. No allegations of dishonesty had been raised before in these proceedings. When I raised this with counsel for the University, I was told that this was simply a mistranslation. In his evidence, Mr Marajapov confirmed that he made no such accusation. I do not know how those allegations appeared in formal documents served by the University. It was however an unfortunate mistake, particularly in light of its timing. Allegations of dishonesty should not be made lightly and must be properly set out in statements of case so that the party against whom they are made has a proper opportunity to deal with them.
15. The Company relied on the evidence of 3 witnesses:
- a. Mr Darbekov had been a lawyer working for the University at the time the Contract was entered into and he signed the Contract on its behalf. In my view, he was doing his best to assist the Court. He was not closely involved in the commercial negotiations. However, he had some insight into them as a result of his role;
  - b. Ms Badyrova was a director of the company which represents the Company's interests in Kazakhstan. She was the person who assisted the Jordanian students in their transfer and was in contact with them to deal with any problems which arose. She also gave evidence about meetings which took place with the University in early 2022 and about the steps the Company had taken to gain accreditation for the University in Jordan. She gave her evidence clearly and I found her to be an honest witness. She could not remember some of the dates of the events. However, that is unsurprising;
  - c. Mr Daoudieh was the owner of the Company. He gave evidence about a number of matters including the Company's reimbursement of sums to the transfer students. He was not cross-examined on that evidence. I found him to be an honest witness.
16. I was also provided with a number of documents. As was pointed out by counsel for the University, where evidence of witnesses conflict, the documents are likely to be the most reliable guide to the facts. The University however repeatedly pointed out that, in some respects, additional documents must exist to shed light on factual assertions made by the Company. No doubt that is true. However, the SCC is a relatively informal process and there is no requirement to produce every document which might support or be relevant to a case. The fact that other evidence might exist does not undermine the value of the evidence which has in fact been produced.
17. Ultimately, there were relatively few facts seriously in dispute.

#### The facts

18. According to Ms Badyrova, in 2018, the Company attracted a number of students to the medical universities of Kazakhstan, including KazMUCE.
19. In April 2021, KazMUCE was forced to close. As a result, its students were distributed to other universities. This was the subject of, it seems, intensive negotiations, including at diplomatic level.



20. On 5 May 2021, the Kazakhstan Ministry of Education and Science issued a letter to the Jordanian Embassy, setting out the procedure for the transfer of students to other universities.
21. According to Ms Badyrova, all medical universities were supposed to accept students but most did not, claiming they had insufficient space.
22. Ms Badyrova's evidence was that the Jordanian Embassy asked the University to accept the students directly, but it refused, requiring foreign students to be represented by an agent. This account is supported by a letter from the Jordanian Embassy dated 30 May 2023, which confirms that the University insisted that the Jordanian students use an intermediary. Counsel for the University challenged this evidence, saying that there would be other contemporaneous correspondence if it were true. That may or may not be the case. However, the evidence that I have seen is clear and I have no reason to doubt it – the University insisted that the students use an intermediary.
23. Ms Badyrova explained that the agreement reached under the Contract was to the advantage of the University. Under its then existing pricing, tuition was less than US\$3,000 per student per year. Under the Contract, the price per student was US\$4,200, of which the University would receive 75%, being US\$3,150. The University was therefore receiving more than its current prices, would not have to worry about collecting fees from the students and could rely on the Company to deal directly with the students.
24. On 17 May 2021, the University and KazMUCE signed an agreement for the transfer of students. Clause 2.3 of the Contract stated:

*"The University guarantees to make up the missing credits free of charge..."*

25. According to Mr Darbekov, the primary reason for concluding the Contract was to cover the students who were transferring from KazMUCE.
26. The terms of the Contract were negotiated between the parties in meetings in May 2021. The Contract was signed on 19 May 2021.
27. In material part, the Contract stated as follows (with typographical errors reproduced):

Clause 4.5.1(5):

*"The University undertakes to... Provide educational services to foreign citizens (applicants/students) enrolled in the University in accordance with established curricula and programs;"*

Clause 4.5.1(12):

*"The University grants the Partner the exceptional (exclusive) right to attract foreign nationals (applicants, students) from the following countries: Arab Republic of Egypt, Hashemite Kingdom of Jordan, Republic of Iraq, Kingdom of Morocco, Palestine, The University has no right to engage other companies to carry out activities to attract students from the above-mentioned countries, as well as to accept students from the abovementioned countries."*

Clause 4.6.2 [wrongly numbered in the Contract "4.5.2"]

*"The [Company] undertakes to:*

- 1) Step by step on their own and at their own expense to carry out the procedure of Legalization (accreditation) of the University in all the countries listed in the Contract, according to the requirements of these countries, and its confirmation in the established time;*
- 2) On its own behalf on behalf of the University to bear all expenses, but to organize and conduct an advertising campaign on the educational programs implemented by the University at its own expense;*
- 3) Submit in a timely manner the documents necessary for the admission of applicants/students to the University in full, according to List provided by the University officially (including documents for entry visas);*
- 4) Verify and guarantee the authenticity of all documents provided by foreign nationals;]*
- 5) If necessary, issue and transfer to the representative of the University power of attorney to obtain the documents required in the framework of cooperation;*
- 6) Provide the University with written information on the number of entrants/students attracted at least two months before the beginning of the academic year;*
- 7) The Partner may act on behalf of the University only within the limits established by this Contract;*
- 8) To make appropriate arrangements for the admission of applicants/students to the University according to the list provided by the University.*
- 9) To regulate relations between the University and the Partner in the territory of the Republic of Kazakhstan, as well as relations between the University and applicants/students.*
- 10) To carry out explanatory activities to applicants/students about the rules of entry and stay in the Republic of Kazakhstan, as well as the rules of admission and study at the University;*
- 11) To carry out appropriate registration and payment of study visa for applicants/students in accordance with the legislation of the Republic of Kazakhstan in the field of migration of the population.*
- 12) Sponsorship of the University in the form of a book purchase list provided by the University on an annual basis."*

Clause 7:

- "7.1. For the purposes of this Contract «income from joint activity» is defined as the total amount of money received by the settlement account of the Partner for the provision of educational services with the attracted foreign citizens (applicants/students).*

7.2. *The amount of revenue from joint activities to be distributed among the Parties shall be taken to be 100 %, of which:*

*75% of the income you pay to the University;*

*25% of the income is paid to the Partner.*

7.3. *The cost per student is \$4,200 (4,200) per school year.”*

Clause 10:

**DURATION, PROCEDURE FOR MODIFICATION OF THE AVOIDANCE OF THE CONTRACT**

10.1. *This Contract shall enter into force on the date of its signature by the authorized persons of the Parties and shall remain in force until the Parties have fulfilled all the obligations specified in this Contract , but in any case until the complete completion and completion of studies at the University attracted under this Contract students, and in terms of mutual settlements - until their full implementation by the Parties. The termination of this Contract shall not absolve the Parties from liability for breach of its terms.*

10.2. *The parties have reached a mutual decision that the obligations of the Partner under this Contract to attract applicants and students to the University shall be terminated if the University refuses to attract and enroll students from the countries specified in subparagraph 4.5.1. Of Contract. In this case, the other terms of the Contract on fulfilled obligations of the Parties shall remain in force and shall apply until the completion of studies by students engaged by the Partner under this Contract.”*

28. On 21 May 2021, the Rector of the University wrote to the Company saying:

*“NJSC “Astana Medical University” announces that it is ready to accept students from Jordan studying at the Kazakh Medical University of Continuing Education for the relevant courses in accordance with the transcript (the difference between universities will close as much as possible during the year free of charge.”*

29. Approximately 104 Jordanian students were ultimately transferred to the University. A list was provided to the University on 24 June 2021. The Company sent the University a different list identifying 101 students on 16 February 2022. It appears some of the students in the original list may have transferred to a different university. Nothing however turns on this.

30. On 30 June 2021, the University wrote to the Company noting that since 1 June 2021, some Jordanian students had transferred. The letter referred to an appendix which listed 104 students. The letter asked the Company to *“conclude a commercial services contract (Appendix 2) and make payment for foreign students...”*. No Appendix 2 was attached.

31. According to an Act of Reconciliation prepared in April 2022 for the tuition year 2021 – 2022, the Company paid a total of US \$ 299,970 in December 2021 for tuition fees for the transferred students.

The Act records debits of US\$ 291,034.13, leaving a balance owing by the University to the Company of US\$ 8,935.87.

32. In her oral evidence, Ms Mahanova confirmed that she was the person who prepared the Act of Reconciliation. Her evidence was that the statement only set out what had been received from the Company. In fact, it also set out what was due and confirmed an overpayment of US\$ 8,935.87. I do not consider that this reflects badly on Ms Mahanova. Given her late introduction as a witness, it was not possible to show her the documents in the course of her questioning.
33. Ms Mahanova confirmed that the statement was prepared by reference to the Contract. As far as she was concerned, the Company was paying the students' tuition fees because their tuition was being dealt with as falling within the terms of the Contract.
34. According to Ms Badyrova, she assisted the students in the transfer. She says she worked closely with university staff, ensuring that transcripts were brought across and dealing with any questions that arose. One of the university secretaries travelled to Almaty to speed up the process and they worked together to ensure all the documents were complete. Ms Badyrova says she also worked with the students to resolve all issues arising with them, including visa processing, searching for housing and other issues arising outside the University.
35. Counsel for the University suggested that there would be documents evidencing these activities. Ms Badyrova confirmed that she had such documents. They had also been referred to in her witness statement but not produced. I do not consider that the fact that these documents were not produced undermines the Company's position. Ultimately, it is accepted that the students did transfer. This must have been a significant undertaking, involving administrative transfer of transcripts, updating of visas and relocation of students. The University has not suggested that it provided the students with assistance with this. In the circumstances, I accept Ms Badyrova's evidence on this.
36. Ms Badyrova's evidence was that steps were also taken to commence the process of the University's accreditation in Jordan. According to Ms Badyrova, the Company hired a specialist referred to a "*Abilova K.S.*" who worked with the international department of the University, spending a week there in 2021. It appears clear that some progress was made. I have seen a letter from the Jordanian embassy to the University dated 14 October 2021, in which the embassy sought extensive further information from the University. On 19 January 2022, the embassy wrote again, requiring the University to make an electronic application for accreditation.
37. No specific steps were taken to seek accreditation in any of the other countries referred to in the Contract. According to Mr Daoudieh, the Gulf states have an agreement for cross-accreditation. Accreditation in Jordan would have facilitated subsequent accreditation in the other countries. Counsel for the University pointed out that there were no documents to support that position and it was only Mr Daoudieh's opinion. However, I understood Mr Daoudieh to be speaking from his experience of how other accreditation had been obtained. I have no reason to doubt his evidence. In any event, the issue was not put to the test as the University dispensed with the Company's services before accreditation was achieved in Jordan.
38. In November or December 2021, the leadership of the University changed. The relationship between the parties began to change shortly afterwards. The University began to demand payment from some of the students of the 25% of their tuition fee which had been retained by the Company. According to

the Company, the University threatened the students with expulsion if they did not pay. This led to discussions between the parties, in the course of which, the Company says, the University said that payments had been demanded from students by mistake and would be returned.

39. The Company says that it ultimately reimbursed the students for the sums they paid directly to the University. The University does not accept that. The University's deputy chief accountant Ms Mahanova did however confirm that, with one exception, all of the students were up to date on their fees. The sums due for their tuition had, she said, been paid in full, including the sums demanded in respect of catch up tuition.
40. The parties met in early 2022. It is unclear to me how many meetings took place, but there seem to have been at least two. At one of these meetings in January 2022, the parties agreed that the Company would no longer seek to attract students to the University going forwards.
41. After the meetings, the University began to deal with the student directly and demanded that they pay the full tuition of \$4,200 themselves. The University also demanded further payment from the Company of KZT 21,278,635 in respect of tuition it had provided in the summer of 2021, immediately after the students transferred. It had, it said, had to recall teachers from their holiday to provide online teaching to help students catch up on tuition they had missed at KazMUCE.
42. The Company denied that anything was due. However, it paid \$22,300 towards this demand under protest, to ensure there was no further disruption to the students. The University accepts that this sum was paid.
43. In May 2022, the University again demanded that students pay it the 25% of their tuition which had been retained by the Company. Once again, the Company says, it repaid the students for those sums.
44. The University subsequently required students to fill in questionnaires. In them, the students stated that they had no agent. According to Mr Daoudieh, the students were required to sign these in order to be able to sit their exams.
45. The students were also required to enter into direct contracts with the University. Ms Abushakhamanova confirmed they had been signed in 2023 and backdated.

#### The claim

46. The University seeks an order terminating the Contract under Article 401 of the Kazakhstan Civil Code on the ground that the Company has comprehensively failed to provide the services agreed.
47. In principle, the University also seeks a money judgment. It is however difficult to see how that can now be maintained.
48. In its original claim form, the University claimed the sum of KZT 21,278,635 for catch up tuition fees from the summer of 2021. The claim form also appeared to assert a loss of KZT 380,700,000 (c.\$795,158.95) said to arise from the Company's failure to attract 94 students to the University. The basis for that was never explained and it was not pursued.

49. In supplementary submissions filed on 22 June 2023, the University advanced a different claim, this time for a total of KZT 140,810,239.80. This included a claim against the Company for fees due for the students' tuition for the years 2021 – 2022 and 2022 – 2023, together with the claim for catch up tuition fees. The catch up fees had, it accepted, been partially repaid, leaving an unpaid sum in that regard of KZT 11,631,745.90. In evidence, however, Ms Mahanova confirmed that everything (or virtually everything) had now been paid in respect of the Jordanian students, including catch up tuition. For the University, Mr Kuzhamkulov said that he had no instructions to withdraw the claim. However, he did not resile in any way from Ms Mahanova's evidence.

#### The counterclaim

50. The Company confirmed that it had no objection to the termination of the Contract. However, it sought compensation for fees it had overpaid and paid back to students and for its future 25% fee for the future tuition of the Jordanian cohort.
51. The sums sought were:
- a. The overpaid amount for 2021 – 2022 tuition left on deposit with the University of US\$ 8,935.87;
  - b. The sum of US\$22,300 paid under protest for catch up tuition;
  - c. A further KZT 26,550,000 repaid to students for the 2021 – 2022 year as a result of the University requiring them to pay those sums;
  - d. The Company's 25% commission for 2022 – 2023 tuition being:
    - i. KZT 18,450,000 in respect of tuition paid directly by 41 students to the University; and
    - ii. KZT 4,914,041 reimbursed to 15 students, where the Company had paid the University itself;
  - e. The Company's 25% commission for 2023 – 2024 tuition for 28 students in the sum of US\$29,400; and
  - f. The Company's 25% commission for 2024 – 2025 tuition for 6 students in the sum of US\$6,300.
52. Finally, the Company appears to claim reimbursement of KZT 1,865,868 for fees paid by students who have voluntarily left the University without finishing their education.

#### The central issues

53. In the course of the parties' submissions and evidence, the following central issues emerged:
- a. Whether the fees of the Jordanian students fell to be dealt with under the Contract, such that the Company was entitled to retain 25%;

- b. Whether the Company was liable to pay fees for catch up tuition;
- c. What was agreed between the parties in January 2022;
- d. In light of that, whether the Company was in breach of the Contract in any of the ways alleged so as to justify termination. The most significant related to (a) accreditation (b) attracting students to the University (c) support services for students and (d) sponsorship for course materials;
- e. Whether any sums are due on the claim;
- f. In light of those findings, whether any sums are due on the counterclaim, taking into account:
  - i. Payments made by the Company for regular tuition;
  - ii. Payments made by the Company under protest for catch up tuition;
  - iii. Any payments made to students by the Company, following the University's demands for payment from the students;
  - iv. Any repayments due for students who left the University without completing their studies;
  - v. Any, fees the Company is due for the future years between 2023 and 2025.

54. In addition, the University raised two points in its evidence, which were barely addressed in submission. Neither affects the outcome of this case:

- a. First, it was suggested that the Company's representatives had not presented powers of attorney in meetings with the University. This was said somehow to amount to a breach of the Contract or to invalidate claims made by the Company. This is an artificial point. There is no suggestion that the Company's representatives were ever asked to produce powers of attorney. The University dealt with them at numerous meetings. In any event, the point goes nowhere. There is no case that the University suffered any loss as a result, for example.
- b. Second, it was pointed out that the Company is not registered for tax in Kazakhstan. This also appears irrelevant. The Company had a local entity through which it carried out its activities in Kazakhstan. I have not been shown any law, nor provided with any argument as to how or why this could affect the parties' rights under the Contract.

#### The tuition of the Jordanian students

55. I am entirely satisfied that the students transferred from KazMUCE to the University were intended to be the subject of the Contract. This was disputed by the University. However, in my view, there is no doubt whatsoever that that was what was intended.



56. There are a large number of factors supporting this.
57. Of perhaps most significance, the Company paid for the students' tuition. There is no suggestion that this was done pursuant to any other contract. Nor is it said this was done voluntarily. To the contrary, the University's position remains that the Company was obliged to pay for their tuition.
58. Mr Darbekov, the University's lawyer at the time, confirmed that the Contract was primarily intended to deal with the transfer of the students from KzaMUCE.
59. Ms Mahanova, the University's accountant, confirmed her understanding that the sums due from the Company were due under the Contract.
60. Minutes from the meeting of 14 January 2022 required, at point 2, the University's chief accountant to "*make reconciliation with the Company... on the attracted foreign students*". The reconciliation statement referred to the Contract and set out the sums due from the Company and paid to the University under the Contract.
61. All of this demonstrates that the parties' agreement was that the Jordanian students who transferred from KazMUCE were to be treated as students whose fees fell within the terms of the contract. It is also consistent with the evidence that the University refused to accept the students unless they had an intermediary acting for them.
62. In my view, the suggestion that the Jordanian students did not fall within the terms of the Contract is fanciful. It is also contradicted by the University's own case that sums were due from the Company in respect of tuition. There could be no possible basis to require the Company to pay tuition fees for students if it was not providing services in respect of the students in accordance with the Contract.
63. The University pointed to an agreement entered into between the University and KazMUCE. That contract, it said, governed the transfer of the students. As a result, they were not covered by the Contract. That does not follow at all. The contract with KazMUCE set out the terms of the transfer as between the two Universities. It dealt, for example, with access to documents. It is consistent with the existence of a further contract pursuant to which the students' tuition was paid and other services were provided by the Company.
64. The University relied in its submissions on the questionnaires in which students had stated that they had no agent. I get little assistance from those documents. The students were stating the position in February to April 2023, by which time the University had effectively excluded the Company from its role.
65. It was also suggested that the timing of the agreement and certain correspondence indicated that the students did not fall within the terms. It was said that the list of students was sent by the Company on 4 June 2021 but the students had been studying since 24 April 2021. In my view, this does not assist the Claimant. The transfer was clearly arranged at some speed. The timing of the letter does not affect the question of whether the contract was agreed to cover the transferring students.
66. It appears clear that, in 2021, the University was receiving a good deal. It would receive more in tuition fees than was usual at that time. The Company was then entitled to retain fees on top. In addition to



facilitating the transfer and assisting the students in their transition, the Company would take steps to obtain accreditation and would market the University in other jurisdictions. Not only that, the University would be paid on time for all students, relieving it of the administrative burden and risk of needing to seek payments from each individual student.

67. It is however very clear that the new management introduced in November and December 2021 did not see the Contract in those terms. In their view, the Company was being paid for providing little more than debt collection services. I disagree. However, for these purposes, what matters is that, having agreed the Contract, the University was obliged to allow the Company to retain 25% of the tuition fees.
68. It is regrettable that the University proceeded to demand further payments from the students. The students were in a vulnerable position and were no doubt concerned that, if they did not pay, they would not be allowed to complete their studies. The University knew full well that the students had paid the full fees to the Company and that the Company had paid what was due to the University. This was further confirmed in the Act of Reconciliation signed by both parties in April 2022.

#### Catch up tuition fees

69. It is equally clear that the Company was not obliged to pay any fees for catch up tuition.
70. There was no provision in the Contract which could make the Company liable for those fees. Its obligation was to pay \$3,100 per student per year. The students themselves were not obliged to pay anything. They had no direct contract with the University. Their payment obligations were to the Company. The amount to be paid for their tuition was set out in the Contract.
71. In any event, it appears to have been the agreed position that there would be no charges for catch up tuition.
72. The agreement between the University and KazMUCE signed on 17 May 2021 stated:

*“The University guarantees to make up the missing credits free of charge...”*

73. In addition, in an undated letter, the University’s then rector confirmed that the *“difference between the universities will close as much as possible during the year free of charge”*. According to the University, this was a reference to the difference in courses, whereas the additional tuition was required to catch up on teaching which should have been but was not provided at KazMUCE. There was no evidence to support that suggestion. The statement by the Rector appears to me to be made in general terms and supported by the contract with KazMUCE. In any event, it can only explain the background to the contractual arrangements which were agreed. Pursuant to those, the only tuition fees due were those set out in the Contract.
74. In the circumstances, there was no legal basis for the demand made by the University for catch up fees. The sum was paid under protest and without legal basis. As a result, the Company should be entitled to restitution of the sum paid.

#### The agreement in January 2022

75. The parties both accept that, at or following their meetings in early 2022, they agreed that the Company would no longer take steps to attract foreign students or to seek accreditation for the University.
76. There is some dispute as to how this came about. Mr Marajapov for the University claims that it was Ms Badyrova on the behalf of the Company who said that the Company no longer wanted to cooperate with the University. According to Mr Daoudieh and Ms Badyrova, in fact the University asked to reduce the Company's fees from 25% to 10%. This was refused, as a result of which the University said that it no longer required the Company's services.
77. I prefer the evidence of Mr Daoudieh and Ms Badyrova on this issue.
78. Mr Marajapov made clear in his evidence that he did not value the services being provided by the Company. In his view, they did little more than collect tuition fees from the students. I disagree with that assessment. However, it would explain why the University would seek to reduce the fees and then bring the relationship to an end. The Company's position is supported by a draft amendment to the Contract which refers to *"the refusal of the University to further attract and enroll applicants and students from the countries specified in the Agreement"*. Although it was never agreed, that is a contemporaneous record of the position in February 2022. Similarly, a letter from the Company dated 9 February 2022 states that *"the University refused to accept students from the company for a new intake..."*.
79. There is no similar evidence supporting the suggestion that Ms Badyrova stated that the Company would not cooperate. Nor would there be any obvious motive for the Company in doing so. The University's attitude to the Contract had changed with its management. The Company's had not. The Company's position was that Ms Badyrova would not have been authorised to make a statement of that sort. Whether or not that was true, it seems highly unlikely that she would have done so, given she was not a director of the Company itself.
80. In my view, the University's new management simply did not value the transaction that had been entered into in summer 2021 and wanted to bring it to an end.
81. Ultimately, little turns on this. Both parties accept that the parties agreed that the Company would not be required to undertake any steps going forward to attract students to the University or seek its accreditation.
82. Neither considers that this resulted in the actual termination of the Contract as a whole. The Company's position, with which I agree, is that the result was that the Company would continue to support the existing cohort of Jordanian students until they completed their studies and would continue to be required to pay for their tuition and entitled to retain 25%. This was the effect of clause 10.2 and – in my view – the thrust of what was agreed between the parties in early 2022.

#### Alleged breach of Contract

83. The University's position is that the Company comprehensively failed to provide the services agreed under the Contract. Given the effective termination of other services in early 2022, the focus must be on the services provided in 2021.

84. Under Article 401(2) of the Kazakhstan Civil Code:

*“At the request of one of the parties, the contract may be changed or terminated by a court decision only:*

*1) In case of a material breach of the contract by the other party; or*

*2) in other cases provided for by this Code, other legislative acts or an agreement.*

*Violation of the contract by one of the parties is recognized as essential, which entails such damage for the other party that it is largely deprived of what it was entitled to count on when concluding the contract.”*

85. In oral opening, the University alleged that the Company had failed to meet virtually every obligation under the Contract. Counsel focussed on the following alleged breaches:

- a. Failure to attract foreign students;
- b. Failure to seek or obtain accreditation;
- c. Failure to submit and prepare documents for students or assist with visas;
- d. Failure to pay for course materials.

#### *Attracting students*

86. I do not consider it realistic to expect the Company to have attracted foreign students to the University before January 2022. The Company had attracted students to KazMUCE and then assisted in their transfer. To that extent, it had fulfilled the obligation for the Jordanian cohort. Its next role was to assist accreditation, after which, it would be in a better position to attract students. By early 2022, that had not occurred. At that time, the University confirmed that it did not want the Company to attract any students.

87. In the circumstances, I do not consider that the Company was in breach of this obligation.

#### *Accreditation*

88. The Company sought the University’s accreditation in Jordan. As I have said above, this was the first step to accreditation in the other states referred to in the Contract. Substantial work was carried out to this end. The Jordanian embassy required further information and action by the University, including in early 2022. In the circumstances, by the time the University suspended the Company’s activities, there was no breach by the Company in this regard.

89. There could be no breach afterwards as the University had confirmed it did not wish to receive the services.

#### *Documents and visas*

90. As I have noted, the Company provided the Jordanian students with substantial assistance in their transfer to the University. This included assistance with documents and, I understand, with updating visas to identify their new university.
91. There is no suggestion that any of the students experienced problems with their visas or any other documents. Nor is there any suggestion that the University provided them with independent assistance in that regard. In the circumstances, it appears abundantly clear that the Company fulfilled its duties in this regard.

#### *Course materials*

92. The Company did not provide any payment for course materials. It was obliged to do so under the Contract. However, its position is that it was never provided with a list of materials or a sum which it was obliged to pay. The Company made this clear in its submissions early in these proceedings and said it stood ready to pay what was reasonably due. The University did not, however, explain what sum was due. Nor did it provide any evidence to support the allegation or explain what course materials were involved or what had been requested.
93. In the circumstances, no breach has been established. In any event, given there was no demand for payment or materials, this would not begin to justify termination.

#### *Conclusion on termination*

94. In the circumstances, I reject the University's case that the Contract should be terminated for breach by the Company. To the contrary, it seems to me that the University indicated that it had no intention of complying with its obligations under the Contract. The Company did what it could to salvage the situation, but without success. To its credit, however, the Company has done everything in its power to ensure that the students have not been prejudiced by the University's actions.

#### The University's money claim

95. As set out above, the University's money claim included, in principle, two elements.
96. First, it claims for sums due in respect of tuition. That claim did not survive the evidence.
97. On the evidence of the its own accountant, nothing is due from the students. In fact, rather than receiving 75% of the agreed tuition fee for the students, it has demanded and has been paid 100%.
98. Second, the University pleaded a claim for lost revenue as a result of an alleged failure to attract students. That claim was not developed. In any event, as I have found, the Company was not in breach of that obligation.

#### The counterclaim

99. The Company counterclaimed for various sums.

*Sum on deposit*

100. First, the Act of Reconciliation from April 2022 confirms that, for the year 2021 – 2022, the Company overpaid the University in the sum of US\$8,935.87. That sum appears to have been applied by the University to offset its claim for catch up fees. For the reasons explained, the University was not entitled to do so. The University is therefore liable to reimburse the Company that amount.

*Catch up tuition*

101. Second, the University demanded and was paid under protest US\$22,300 in respect of catch up tuition. It was not entitled to do so and must repay the sum.

*Sums repaid to students for 2021 – 2022*

102. Third, the Company claims to have repaid students a total of KZT 26,550,000 in respect of 59 students' tuition fees. Each student had paid the Company KZT 1,800,000, the equivalent of about \$4,200 when it was paid. The Company retained KZT 450,000 and paid the balance to the University. In late 2021, the University demanded a further KZT 450,000 from the students. As set out above, that has been paid. According to the Company, it repaid those sums to the students to ensure that they would not suffer a loss.
103. The evidence that the payments were made is provided by Mr Daoudieh. He provided a spreadsheet identifying the 59 students and recording the sum paid in respect of each. Mr Daoudieh's evidence was supported by Ms Badyrova. Counsel for the University complained that no supporting documents were produced. However, he chose not to challenge either witness on their evidence on this issue. Nor has the University approached any of the students to check whether they have been repaid by the Company. In the circumstances, I accept the Company's evidence that it repaid the sums that the students had been obliged to pay twice. That action was, in my view, admirable. It ensured that the students – who were innocently caught up in a dispute between the parties – did not suffer as a result of the University's unilateral actions.
104. In the circumstances, I find that the University is liable in restitution to repay the Company the sums repaid to the students of KZT 26,550,000.

*Fees for 2022 – 2023*

105. Similar considerations apply for the sums claimed in respect of the 2022 – 2023 year. The Company paid the University for 15 students. However, it was subsequently obliged to reimburse them 25% of the fee when the University demanded it from the students. The University procured payment from 41 students directly. Those payments should have been taken from the Company and it should have been entitled to retain 25%. In taking 100% of the tuition fees directly and retaining the full sum, the University was clearly in breach of the Contract. In the circumstances, the Company is entitled to recover those fees.
106. The sum claimed is KZT 18,450,000 for the fees paid directly. That is consistent with fees of KZT 450,000 for 41 students. For those reimbursed, the Company claims only KZT 4,914,041 for 15 students. It is not clear why the full KZT 450,000 was not paid for each student. However, the sum claimed is consistent with the schedule provided and less than the full 25% of their fees. In the circumstances, I

accept the Company's evidence that it repaid that sum to students as a result of the University wrongfully demanding it from students. It should be reimbursed by the University.

*Repayment for students who left*

107. In its written submissions, the Company included a claim for partial reimbursement of tuition fees for a small number of students who had been voluntarily expelled from the University. This was not explained at the hearing or supported by the evidence. In the circumstances, I reject that part of the claim.

*Payments for future years*

108. Of the Jordanian students, 28 will continue in tuition into 2023 – 2024 and 6 will continue in the year 2024 – 2025.
109. Had the University honoured the arrangement, the Company would have received 25% of the tuition fees for each student. This would have amounted to a total of US\$35,700, made up of:
- a. US\$29,400 for the year 2023 – 2024 ( $\$4,200 \times 25\% \times 28$ ); and
  - b. US\$6,300 for the year 2024 – 2025 ( $\$4,200 \times 25\% \times 6$ ).
110. The Company has lost that income as a result of the University's actions in bringing about the termination of the Contract. The University must compensate the Company for that lost revenue.

*Collection*

111. In total, the sum due from the University is therefore:
- a. US\$31,235.87 for 2021 – 2022, comprised of:
    - i. US\$8,935.87 overpayment; and
    - ii. US\$22,300 paid under protest;
  - b. KZT 49,914,041, comprised of:
    - i. KZT 26,550,000 for repayments for 2021 – 2022;
    - ii. KZT 18,450,000, being 25% of sums paid by students for 2022 – 2023; and
    - iii. KZT 4,914,041 for repayments for 2022 – 2023;
  - c. US\$35,700 for 2023 - 2025.

Conclusion and remedies

112. In the circumstances, I dismiss the claim, and grant judgment to the Company on the counterclaim in the sum of US\$ 66,935.87 and KZT 49,914,041.

By Order of the Court,

Justice Tom Montagu-Smith KC,  
Justice, AIFC Court

Representation:

The Claimant was represented by Mr. Serik Kuzhamkulov, advocate, Astana Advocates' Bar Association, Astana, Republic of Kazakhstan.

The Defendant was represented by Ms. Ardak Khabiyeva, legal adviser, member of the "Adilzanger" Chamber of Legal Advisers, Astana, Republic of Kazakhstan.



**IN THE COURT OF FIRST INSTANCE  
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE**

**30 March 2023**

**CASE No: AIFC-C/CFI/2022/0003**

**BULDIRSHIN-2012 LLP**

**Claimant**

**v**

**STATE INSTITUTION “ASTANA EDUCATION DEPARTMENT”**

**Defendant**

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**JUDGMENT**

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**Justice of the AIFC Court:  
The Rt. Hon. Sir Jack Beatson FBA**



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Appendix: *Summary of the Positions of the Experts on Kazakh Law on the Issues before the Court*

## JUDGMENT

### A. Introduction

1. This is a claim under a public-private partnership contract to construct and operate a kindergarten for 360 pupils in the City of Astana, hereafter “the kindergarten”, on a plot of land, hereafter “the plot” “*near the intersection of streets with project names No. 29 and No 36*”: PPP Contract, clause 2. It is brought by Buldirshin-2012 LLP, hereafter “the Private Partner” or “the Claimant” against the City of Astana’s Education Department,<sup>1</sup> hereafter “the Public Partner” or “the Defendant”.
2. The contract (hereafter “the PPP Contract”) was entered into on 29 May 2017 and pursuant to clause 155 came into force on 1 June 2017 when it was registered with the Astana Department of Finance. The parties later modified it by two supplementary agreements which reflected the need for the additional cost of the design and construction of a transformer substation connected to the plot and the prolongation of the construction period as described below. Supplementary Agreement No. 1 is dated 11 December 2020 and Supplementary Agreement No. 2 is dated 2 September 2021.
3. The construction of the kindergarten took 30 months rather than the 18 months specified in the project implementation schedule in Appendix 2 of the PPP Contract. In December 2020 paragraph 7 of Supplementary Agreement No. 1 retrospectively replaced that Appendix and provided that construction was to be between 1 August 2017 and 1 October 2020.
4. The kindergarten was completed in September 2020 and opened on 28 September 2020. On 7 October 2020 the Public Partner signed a “Facility Commissioning Certificate” accepting it into operation and state registration of that occurred on 20 October 2020. The act of acceptance of the transformer substation was signed by the Private Partner on 8 October 2020 but state registration was only completed on 2 July 2021 because of an error when registration was first attempted.
5. The nature of the parties’ dispute and their positions are set out in detail later in this judgment. At this stage it suffices to state that the root of the dispute is that the plot the Public Partner provided for the planned kindergarten did not have engineering infrastructure in the form of a transformer substation and an electricity power cable line connected to it.

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<sup>1</sup> The name of the city has changed twice since the date of the contract. On 20 March 2019 the city of Astana was renamed Nur-Sultan but on 16 September 2022 the name Astana was restored. In this judgment, it will be referred to as Astana or “the City” although when the claim was filed and the pleadings were settled it was called Nur-Sultan, and the defendant is named as “*State Institution ‘Nur-Sultan Education Department’*” in the pleadings and in many of the documents relied on by the parties.

6. This was because the Public Partner had envisaged that the kindergarten would obtain its power from a transformer substation that was to be built on a neighbouring site on which another kindergarten was to be built. That substation, designed and costed in 2015, was to be constructed by another private partner but was not built because the plan to build the other kindergarten did not proceed. Although it was put out to tender twice, no investor had bid for it.
7. The consequences of the lack of electricity infrastructure were discussed at meetings of the PPP Competition Commission and the Commission for Direct Negotiations on the implementation of the PPP project on 11 October 2019, and a meeting of the PPP Commission on 10 February 2020. Those meetings decided that the construction period for the kindergarten should be extended, and the Private Partner would construct and commission a transformer substation and be reimbursed for its investment costs by the Public Partner.
8. The questions for decision in the present case include when the Public Partner provided the plot of land and whether it was responsible for the consequences of the absence of the electricity infrastructure. Those consequences included delay, increased expenses, and loss of profit. In particular, are only the investment costs specified in the contract recoverable or is the Private Partner entitled to its actual investment costs and losses of profits. The questions also include whether the Private Partner was in breach of its obligation to provide reports *inter alia* on the status of construction and, if it was, the consequences of any breaches.
9. The Public Partner also alleges that the Private Partner did not fulfil its obligation under clause 94(4) of the contract to admit “*at least 100% of the capacity of the kindergarten within the framework of the state educational order for pre-school education/training*”. But, at a CMC on 18 October 2022, just over a month before the date of the hearing, I accepted an application by the Private Partner that the issue of placement and proportion under the state order should not be heard together with its claim. I summarise the basis of the Private Partner’s application and set out my reasons for accepting it at [56] - [61] below.<sup>2</sup>

## **B Applicable Law and Jurisdiction**

10. Clauses 129-130 of the PPP Contract provide that the contract is governed by the law of the Republic of Kazakhstan.
11. As modified by clause 4 of Supplementary Agreement No 1, clause 134 of the PPP Contract, which deals with Dispute Resolution, confers jurisdiction on this, the Astana International Financial Centre Court, hereafter “the AIFC Court”, to resolve disputes related to the contract.

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<sup>2</sup> References in square brackets are to paragraphs of this judgment.

- 12 It is common ground that the PPP Contract, in this case for the construction and operation of the kindergarten as a PPP facility, falls within a category of civil-law investment long-term public-private agreements that are concluded and performed in particular in accordance with the Law on Public-Private Partnership No 379-V LRK dated 31 October 2015, (hereafter “the Law on Public-Private Partnership”), the Civil Code of the Republic of Kazakhstan (hereafter “the Civil Code”), and the Entrepreneurial Code of the Republic of Kazakhstan (hereafter “the Entrepreneurial Code”): see section 1 of the Joint Report of Dr Nesterova and Mr Privalov, the experts on Kazakhstan Law. That reflects Article 2(1) of the Law on Public-Private Partnership which provides that:

*“The legislation of the Republic of Kazakhstan in the field of public private partnership is based on the constitution of the Republic of Kazakhstan and consists of the Civil Code of the Republic of Kazakhstan, this law and other regulatory acts of the Republic of Kazakhstan”.*

### **C Procedural History**

- 13 The Private Partner filed its claim on 11 February 2022. The Public Partner’s response to the claim is undated but was received by the Registry of the AIFC Court on 28 March 2022. The Court held a Case Management Conference on 7 April 2022 and, on 8 April 2022, issued Directions Order No. 1 which *inter alia* fixed the trial for 2 and 3 August 2022, with the possibility of sitting on 4 August if necessary. Pursuant to that, the parties filed the documents and legislation<sup>3</sup> on which they relied in English and Russian, and served various statements by the witnesses of fact as referred to more fully below. Written opening submissions were filed by the Public Partner on 14 July 2022 and by the Private Partner on 26 July 2022. The Private Partner also filed Dr Nesterova’s report on Kazakhstan law dated 22 June 2022 with supporting material annexed to it.
- 14 There were, however, delays in filing documents. More significantly, the Public Partner did not file an independent expert’s report as required by Directions Order No. 1, and its Opening Submissions, entitled “*Written Introductory Statement outlining our Position and with a brief supporting argument*”, consisted of four paragraphs on a single page. By 22 July 2022 it was clear that the case would not be ready for trial by the hearing on 2 and 3 August 2022, and those dates were vacated by the Court.
- 15 On 28 July 2022 the Public Partner informed the court that it did not have the financial resources to pay for an independent expert's report. Although the trial dates had

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<sup>3</sup> In this judgment I use the Ministry of Justice of the Republic of Kazakhstan’s English translations of the Constitution, the Civil Code, and the laws on Public-Private Partnership and on Architectural, Town Planning and Construction Activity available on its website. No issues concerning those translations were raised by the parties.

already been vacated, on 4 August it applied to postpone the trial, stating that it needed time to submit a candidate to be an independent expert. On 15 August and 7 October 2022, the Registrar gave further Instructions about the expert witnesses and required the parties to provide the court with the availability of their witnesses of fact and expert witnesses.

- 16 I have referred to the CMC on 18 October 2022. After it, on 21 October 2022, Directions Order No. 2 was issued. That order granted the Public Party permission to use the report of its expert Mr. Gennady Privalov dated 17 October 2022 at the trial and call him to give evidence, and to file an additional Opening Submission to supplement its earlier one-page *“Written Introductory Statement”*. A new trial date was fixed for 22 and 23 November 2022 with the possibility of the hearing continuing on 24 November. The Order gave further directions concerning the witnesses of fact and the service of witness statements and expert evidence as to Kazakhstan law in accordance with Part 19 of the Rules of the AIFC Court. It also directed the parties to provide a list of the factual and legal issues in the case, identifying issues on which there is agreement and those on which there is no agreement. It also recorded that the Court would deal with any disputes as to the meaning of a document which had been translated into English in accordance with Article 31(4) of the AIFC Court Regulations 2017 and rule 2.4 of the AIFC Court Rules 2018.
- 17 The trial took place on 22 and 23 November 2022 in the AIFC Court’s Court Room in Astana. The third day was not required. The claimant was represented by Ms. Gulnur Nurkeyeva, a partner in the Grata International Law Firm and the defendant by Mr. Nariman Elamanov, the Deputy Head of the Education Department of the City of Astana, but not a lawyer. During the hearing, the Tribunal heard evidence from the witnesses and experts referred to below as well as oral opening and closing submissions by the representatives of the parties. Following the hearing both parties filed written closing submissions on 30 November 2022.

## **D The Background**

- 18 I have referred to the *Law on Public-Private Partnership* which regulates public-private partnerships between state bodies and private entities in Kazakhstan. Article 3 of that law sets out the objects and principles which apply to such partnerships. The objects include *“attracting investments to the state economy by pooling the resources of a public partner and a private partner for the development of infrastructure and life support systems”* and *“increasing the level of availability and quality of ... services, taking into account the interests and needs of the population ...”*: Articles 3.1(2) and (3). The principles include *“identification of a private partner on a competitive basis”* except where authorised by that law: Article 3.2(2). They also include *“the principle of balance – mutually beneficial distribution of responsibilities, guarantees, risks, and revenues between the Public Partner and the Private Partner in the implementation of the public-private project”*: Article 3.2(3).

- 19 There are a number of mechanisms for implementing public-private partnerships. The PPP Contract in the present case provided for a BTO (Build, Transfer, Operate) mechanism. Under that, the public partner provides the plot upon which (in this case) the kindergarten is to be constructed on a temporary gratuitous use and turnkey basis, the facility is transferred to the state upon completion of construction, and is then operated by the private partner during the term of the contract: see clauses 23 and 86 of the PPP Contract and see further *Concept of the PPP Project “Construction and Operation of kindergartens in Astana*, §2.1.1 and 3.3 (hereafter “*Concept*”).
- 20 In 2016 the Akimat of Astana decided to use a contractual Public-Private Partnership to address a shortage of over 80,000 places in institutions for preschool education and training for children in Astana because of the lack of buildings for kindergartens in public ownership and growth in the birth rate: see *Concept*, §§2.1.1, 3.4.1 and *Conclusions*. What was envisaged was the construction of five kindergartens by a private partner or partners with a total capacity of 1,440 places of which 480 places would be in the State Order: see *Concept*, Table 55 and §3 of the Standard Tender Documentation of the project.
- 21 The *Concept* stated (see §2.1.4) that it was planned to implement a contractual PPP because of “*the need to attract a private partner for 100% investment in the construction of PPP facilities*”. It also stated (see §3.5.5) that “*compensation of investment costs will ensure repayment of debt obligations of the private partner, as a result of which the return on investment is achieved, there are no cash gaps, and the financial attractiveness of the project increases.*” The *Concept’s* conclusions stated that “*in order to ensure the attractiveness of the PPP project for the private partner, according to the institutional scheme, it is assumed that the public order will be placed in PPP facilities for at least 33% of the project capacity, the remaining part can be organised by the Private Partner on a private basis*”. The conclusions also stated that “*From the point of view of technical support, the project is fully implementable. Land plots for placement of kindergartens are defined, there are developed working projects for construction*”.
- 22 The project was put out to tender. Each of the five kindergartens was a separate lot and bidders were able to bid for the entire project or for one or more of the lots. Lot 4 was to build the kindergarten which has given rise to the dispute in this case. Paragraph 14 of the standard tender documentation for the project required a tenderer who wished to bid to submit documents to confirm compliance with the qualification requirements in paragraph 15 by 28 November 2016. Paragraphs 21, 29 and 34 required applications in sealed envelopes to be made by 13:00 hours Astana time on 20 December 2016, with the envelopes being opened later that day and a decision to be made within 10 days of the opening of the envelopes. The qualification requirements included a requirement in paragraph 15(5) to provide a letter of guarantee that the potential private partner was solvent. Where the potential private partner intended to take out a loan to implement the project, paragraph 15(14) required it to confirm the readiness of financial organisations to provide financing to it if it was recognised as the winner of the competition.

- 23 Paragraph 27 of the tender documentation set out the criteria for determining the best tender applications, and the points-based system for evaluating the criteria. The criteria included the amount of the amount of state obligations under the project, the term of payment of state obligations, the construction period, the tenderer's experience of implemented similar projects, and (see paragraph 27(12)) the percentage of places offered by a potential private partner for children under a state order. A table in paragraph 28 sets out the way the criteria are evaluated in. Item 11.1 of the table states that the *"State order under the project is 33% (in the context of each kindergarten)"* and *"P% - 1.5 points assigned (subtracted) for each 1% increase (decrease) in the basic share of placement of children under the state order for project"*.
- 24 Buldirshin-2012 submitted its bid for Lot 4 on 20 December 2016. It was the only bidder for that Lot: see Protocol No 6 to Meetings of the Competition Commission to Determine a Private Partner dated 20 April 2017, and the evidence of Ms Bikeeva. A letter dated 20 December 2020 from the Chairman of the Council for the Protection of the Rights of Entrepreneurs to the Mayor of Nur-Sultan stated that *"this PPP facility is the only pre-school facility in Nur-Sultan built within the framework of PPP"*.

#### **E The Terms of the PPP Contract**

- 25 The PPP Contract is in 33 Parts and has 184 clauses and 6 Appendices. Its provisions on the applicable law and the jurisdiction of this Court have been summarised at [10] – [12].
- 26 Part 3 of the contract deals with the procedure for granting a land plot to the Private Partner. Clause 7 provides that the Public Partner *"undertakes, within 60 (sixty) calendar days from the date of entry into force of the Contract, to take all necessary measures in accordance with the law to provide the Private Partner with a land plot for the construction and operation of a PPP facility"*. Clause 8 provides that the description of the land plot required for the kindergarten is specified in Appendix 3 and that *"the engineering infrastructure must be connected to the provided land plot to the connection point"*. Clauses 4 and 23 provide that the Private Partner is to construct and operate the kindergarten for the specified implementation period of 20 years and 10 months after which it is subject to transfer to the state for ownership and use. That period was modified by clause 2 of Supplementary Agreement No 1 made on 11 December 2020 to 22 years and 6 months.
- 27 Clause 4 and Appendix 2 of the contract originally specified an implementation schedule of 2 months to *"financial closure"* and an 18-month period for construction from the date of financial closure. Clause 1(13) defines *"financial closure"* as *"the date on which the Private Partner provides a written notification to the Public Partner that it has received the right to access the use of financial resources, including those provided by financial institutions (investors) under the contract with the Private"*



*Partner on financing necessary for the construction ...*". The contract also originally specified 2 months for commissioning of the kindergarten, and 19 years for its operation and use by the Private Partner: see clauses 158 and 159 and Appendix 2. The construction period was later modified by clause 6 of Supplementary Agreement No 1 to a period of 38 months from the date of financial closure. Clause 7 of Supplementary Agreement No 1, made on 11 December 2020, and amended Appendix 2, provided that financial closure was to be the period between 29 May and 29 July 2017, that is, it remained within 2 months of the date of the contract.

- 28 I turn to provisions concerning the financing of the project and the sources of cost recovery and income generation. As to financing, clause 18 of the contract provides that the sources, size and terms of the financing for the PPP project are specified in Appendix 4. Appendix 4 states that 10% of the cost of the facility is to come from the Private Partner's own funds and 90% of the cost from funds borrowed by the Private Partner.
- 29 Part 11 of the contract specifies the sources of cost recovery and revenue generation for the Private Partner. Clause 71 provides that these are *"implementation of services during the operation of" the kindergarten and "compensation of [its] investment costs in accordance with the budget legislation of the Republic of Kazakhstan"*.
- 30 Clause 72 provides that *"compensation for investment costs to the Private Partner"* (hereafter "CIC") <sup>4</sup> *"is determined in accordance with the legislation"*. Clause 73 provides that the CIC by the Public Partner to the Private Partner *"under this contract amounts to 1,688,648,570 KZT"*. By Supplementary Agreement No 2 the figure in clause 73 was amended in the light of the Public Partner's agreement to compensate the Private Partner for the work on the transformer substation and power cable line. As amended, clause 73 provided that the total CIC by the Public Partner to the Private Partner under the contract is 2,035,174,570 KZT, of which 1,688,648,570 KZT is the CIC for the kindergarten building and 346,526,000 KZT is the CIC for the construction of the transformer substation.
- 31 Clause 74 provides that the CIC includes expenses for the construction of the PPP facility and expenses for managing the company during its construction. Clauses 75-76 provide that the payments are made after the facility is commissioned by the periodic payments specified in Appendix 6 to the contract *"subject to adjustments provided for in this Contract"*.
- 32 Clause 80 provides that *"if the Private Partner violates its terms [it] pays the Public Partner penalties or the Public Partner reduces the payment of the CIC by the amount of penalties in each individual case of such violation..."*

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<sup>4</sup> This is the abbreviation/acronym used in the contract and which I use in this judgment, but a number of others, including CIP, CIM, CMP, and CIE are used in the English translations of the documents.



- 33 The other terms of the contract that are material to the dispute are set out or summarised in this and the following paragraphs. Clauses 12 to 16 deal with failure to grant or delay in granting the Private Partner the right to use the land plot through no fault of the Private Partner which results in the Private Partner not being able to start construction. Their effect is that for delays not exceeding 180 days the Private Partner is entitled to extend the period for the construction of the kindergarten by the period of the delay and for longer delays to receive compensation in accordance with clause 145.1 and/or a penalty.
- 34 Part 6 of the contract deals with the construction of the PPP facility. Four clauses were relied on in the submissions. Clause 27 provides that construction is carried out with funds raised by the Private Partner and risks arising during the construction *“are assigned to the Private Partner”*. Clause 36 provides that *“If the Private Partner discovers circumstances beyond the control of the Parties that make it impossible to construct and commission the PPP facility within the time limits stipulated by the C, and (or) operate the PPP facility, the Private Partner undertakes to immediately notify the Public Partner of these circumstances in order to coordinate further actions of the parties to fulfil this Contract”*. Clause 37 gives the Public Partner *“the right to assign the Private Partner to perform additional work that is not specified in the contract ... but is required due to unforeseen circumstances”*. Clause 40 gives the Private Partner *“the right to extend the construction period ... with compensation for costs, due to any of the following reasons: delay, suspension or obstacle caused by the actions of the Public partner, including, but not limited to, failure to submit land plots within the terms of the Contract”*.
- 35 Part 7 of the contract deals with the operation of the PPP facility. By clause 44, the facility is transferred to the Private Partner for operation for a period of 19 years. Clause 49 provides:
- “... the Private Partner is obliged to provide pre school education and training services under the following conditions: (1) accept children in the amount of at least 100% of the capacity of the kindergarten within the framework of the state educational order for preschool education and training, the amount of per capita funding per pupil. The amount of per capita funding and parental fees per pupil for preschool education and training of children is approved annually by the resolution of the Akimat of Astana. ...”*
- 36 Part 13 of the contract concerns ownership of the PPP facility and its transfer. Clause 86 provides that the *“created and Commission PPP facility shall be subject to transfer to municipal ownership”*. It also states that *acceptance of PPP facility into municipal ownership, and subsequent transfer into operation to the Public Partner shall be carried out in accordance with the requirements of current legislation.”*
- 37 Part 14 of the contract concerns the rights and obligations of the Public Partner and Part 15 those of the Private Partner. By clause 92(2) the Public Partner must *“ensure*

*that the Private Partner is provided with a land plot for the construction and operation of a PPP facility, in accordance with the legislation and this contract". By clause 92(6) the Public Partner must "ensure timely payment of CIC to the Private Partner in accordance with the terms of the contract and legislation". Clause 92(7) provides that the Public Partner must "ensure that the Private Partner receives a state educational order for pre-school education and training, the amount of per capita funding per pupil in the amount of at least 100% of the capacity of the kindergarten".*

- 38 By clause 93(5) the Private Partner has the right to receive CIC in accordance with the terms of the contract and the legislation and, by clause 93(7), to claim damages. Clause 94(4) is the corollary of clause 92(7). It provides that the Private Partner must *"accept children in the amount of at least 100% of the capacity of the kindergarten within the framework of the state educational order for preschool education and training, the amount of per capita funding per pupil"*. Supplementary Agreement No 2 added a new clause 94(17) which provides that the Private Partner must *"transfer the transformer substation to community communal ownership by signing the statement of transfer and acceptance and other necessary documents"*.
- 39 Part 17 of the contract deals with PPP monitoring. Clause 100 requires the Private Partner to provide *"the Public Partner with a quarterly report on the performance of the Private Partner's obligations under the contract within 10 (ten) calendar days from the end of the reporting period. The report must contain the documents specified in Appendix 5 to the contract"*.
- 40 Appendix 5 lists 21 categories of document required for submitting a report during either the construction phase or the operation phase of the contract or both. I list nine of the ten categories referred to by Mr Privalov (Report, page 12). Many, including the project implementation and construction schedule (by month) (10), loan agreements (14), bond prospectuses and information about bond holders (15), insurance contracts (12) and guarantee agreements (13) must be submitted *"once and as it changes"*. Others, including financial statements (4), the risk matrix for the project (7), and information about state support measures (8) must be submitted *"on a quarterly basis"* and, in the case of construction reports (16) and a photo report on the results of construction (18), on that basis during the construction period.
- 41 Clause 102 of the contract obliges the Parties *"to provide each other with timely information necessary for the performance of their obligations under the contract, and immediately notify each other of the occurrence of significant events that may affect the proper performance of the obligations provided for in the contract"*.
- 42 Part 18 of the contract deals with risk allocation, risk assessment and measures for their control. Clause 104 is a table setting out the parties' agreed allocation of 24 risks under the contract. Those allocated to the Private Partner include the risk of increase of construction costs (1), untimely financial closure (8), deviation from the working documentation (17), increasing the construction period (18), and the cost of raw materials (19). Those allocated to the Public Partner include the risk of untimely supply

of engineering communications (11), changes of plans proposed by local authorities or other government bodies (12), and untimely access to the site (13).

- 43 Clause 105 deals with what are called “disruption events”. They include, (1) the failure of the Public Partner to fulfil its own obligations under the contract, (2) violation of the payment term for CIC exceeding 30 days, (8) violation of deadlines and increase in costs by 5% or more during the construction which occur not due to the fault of the Private Partner. Clause 107 provides that the parties have the right to restore the financial balance in accordance with the financial and economic model if there is a violation of the balance as a result of either a favourable event or a disruption event. Clause 109 provides a procedure for the parties to do so by making changes to the CIC and other payments and for early termination or extension of the contract.
- 44 Part 19 of the contract deals with the liability of the parties. Clause 110 provides that they are liable under the contract and the Law on Public-Private Partnership for any non-performance or improper performance of obligations under the contract. Clause 114 provides that *“Payment of compensation, penalties (fines), damages of the Parties arising as a result of default or improper performance by the other Party of its obligations under the contract is made in accordance with the Contract”*. Clause 115 provides that *“The Public Partner will be liable for losses, expenditures and expenses (including legal costs and payments) caused to the Private Partner... if such losses, expenditures and expenses arose solely through the fault of the Public Partner and such guilt is proved in court”*. Clause 116 provides that *“Any Party has the right not to start performing its obligations under the Contract or to suspend their performance with immediate notification to the other Party, if the other Party’s violation of its obligations under the Contract hinders the performance of the obligations stipulated in the Contract”*.

## **F The Claim and the Defence**

- 45 I gave a general summary of what lies at the root of the dispute at [5]. The Private Partner’s case is set out in its claim form dated 11 February 2022, an undated supplement to the Statement of Claim received by the Registry of the AIFC Court on 13 July 2022, and its written and oral opening and closing submissions. The Public Partner’s case is set out in an undated response to the claim received by the Registry of the AIFC Court on 28 March 2022, and in its written and oral opening and closing submissions. The Court also had before it a list of the factual and legal issues in the case and the parties’ respective position prepared pursuant to §9 of Directions Order No 2 dated 21 October 2022. The positions of the parties can be summarised as follows.

### **(i) The claim**

- 46 The Private Partner claims that the land plot provided by the Public Partner for the construction of the kindergarten did not have the engineering infrastructure (in

particular, a transformer substation and a power cable line) connected to it at the connection points as required by clause 8 of the contract. The consequence was, it submitted, that, by clause 104(11) of the PPP Contract, the risk of “*untimely supply of engineering communications*” was allocated to the Public Sector. The design and estimation documentation provided for the kindergarten to be constructed in 2017-2018 and the estimated costs were based on estimated prices for those years.

47 It submitted that the failure to provide a transformer substation and a power cable line connected to the land plot led to a significant delay in the investment and construction stages and the commissioning of the kindergarten. It was, it maintained, a breach of contract which resulted in an increase in the CIC, the investment costs incurred by it for the project, loss of profits and other losses arising as a result of default or improper performance by the Public Partner of its obligations under the contract. Its case is that the Public Partner is liable to pay the investment costs specified in the contract and the difference between those and the actual investment costs and loss of profits caused to it. It originally also claimed for real damage and actual CIC in respect of the transformer substation and cable line. In its opening submissions, however, it sought to withdraw those claims while reserving the right to bring fresh proceedings for them. Its reasons for seeking to withdraw that part of the claim were that the CIC for the transformer substation and the actual damage caused had not been subjected to forensic examinations, and documents, including the certificate of acceptance and contracts with individuals and banks for the provision of credit, had not been filed. I deal with its application at [179] – [182].

48 The Private Partner seeks the following relief:

- (a) Payment of the CIC specified in the Payment Schedule in Appendix 6 to the PPP Contract as amended by Supplementary Agreement No 1 which was due in 2018 and 2019 but not paid. This element of the claim is for 281,441,428 KZT for 2018 and 281,441,428 KZT 2019, a total of 562,882,856 KZT. The Public Partner does not dispute the debt in respect of those amounts or that it remains unpaid. But for the reason summarised at [55], it has asked the Court to require the Private Partner to enter into an agreement postponing payment to the period 2024-2025.
- (b) Payment of the difference between the CIC specified in the PPP Contract as amended and the Private Party’s actual investment costs in respect of the kindergarten. The Private Partner claims this difference constitutes “real damage” to which it is entitled because, under clauses 104(11) and 105 of the PPP Contract, the delayed delivery of the electrical infrastructure was a disrupting event the risk of which was borne by the Public Partner. The Private Partner was accordingly entitled to compensation for its actual investment costs. It submitted its actual expenses for the kindergarten totalled 2,515,634,896 KZT; an additional 480,460,326 KZT as at 17 November 2020. Originally an additional 167,876,737 KZT was claimed in respect of the transformer substation as at 17 November 2021, but, as I have stated, the Private Partner wishes to withdraw that part of the claim while reserving the right to bring fresh proceedings for it.

- (c) a penalty under Articles 295 and 353 of the Civil Code and Clauses 110 and 114 of the PPP Contract because the Public Partner failed and/or delayed in fulfilling its monetary obligations under the contract. It thus unlawfully used the unpaid principal debt of 562,882,856 KZT (see (a) above) from 18 November 2020, the date of state registration of the Act of Commissioning of the kindergarten until 3 August 2022. The sum claimed under this head is 100,478,446.23 KZT.
- (d) loss of profits of 611,428,598 KZT between 2018 and 2020 under Articles 9, 350 and 351(1) of the Civil Code for losses not covered by the penalty.
- (e) The claimant's legal costs of 50,000,000 KZT.

The total sum claimed is thus 1,805,250,226 KZT.

***(ii) The Response to the Claim***

- 49 The Public Partner's pleaded case is contained in its initial response and defence to the claim, received by the Registry of the AIFC Court on 28 March 2022. That case has a number of limbs, one of which, "the state order issue", involved a counterclaim, which, at the 18 October 2022 CMC, for the reasons in [56] – [61], I ruled should not be heard together with the Private Partner's claim. The Public Partner's response was supplemented by two short opening submissions and its closing submissions, and the way it put its case evolved to some extent. The summary of its case in the following paragraphs reflects that evolution and includes points made in its opening and closing submissions.
- 50 The first limb of the Public Partner's pleaded case is that the plot of land had been provided in a timely manner by 1 August 2017 in accordance with Appendix 3 to the PPP Contract: Response, §7. It claimed that the Private Partner did not immediately notify it that the effect of the absence of electricity infrastructure made it impossible to construct and commission the PPP facility as required by clause 36 of the contract: see Response, §9. It initially maintained (see Response, §10) that the first letter about the transformer substation was received in August 2020 long after December 2018, when the original 18-month period specified for putting the PPP facility into operation expired.
- 51 The second limb of its defence is that the Private Partner failed to provide it with any of the quarterly reports and documents required by clause 100 and Appendix 5 of the contract. It submitted that this breach of contract has two consequences.
- 52 The first is that the Private Partner had no right under clause 116 of the contract not to perform its obligations, to suspend performance, or to maintain that the fault of the Public Partner caused it significant financial losses and increased CIC: Response, §§32 and 35. This meant, it maintained, that under clause 27 of the PPP Contract the

Private Partner bore the risks that arose during the construction period: Response, §15. Those risks included the need to extend that period, the time it took to transfer the obligation to provide the transformer substation to the Private Partner, and Private Partner's additional expenses (CIC) and lost profits: §§15 and 17-18 of the Response. The Private Partner was not therefore entitled to recover its actual CIC, only the CIC accepted by the Public Partner and specified in the contract as amended by Supplementary Agreements No. 1 and No. 2.

- 53 The second consequence is that the Private Partner's breach of contract in not providing the reports required by clause 100 and Appendix 5 of the contract gave rise to a claim by the Public Partner for damages under Article 295 of the Civil Code and clause 80 of the contract: Response, §§35-39.
- 54 The Public Partner's response also relied on the fact that the kindergarten and transformer substation were not transferred to communal ownership after being commissioned as required by clause 86 of the PPP Contract. The reason (discussed at [149] ff.) was the parties' disagreement as to what figure for CIC the relevant documentation for the transfer to communal ownership should contain: Response, §§53-55. The Public Partner maintained it was the amount specified in the PPP Contract as varied by the two Supplementary Agreements. The Private Partner maintained that it was the actual investment costs incurred by it ("actual CIC"). In relation to the transformer substation, §56 of the Response, the final paragraph of this limb of the Public Partner's defence, states that it *"assume[s] that the Private Partner intentionally delays the process of transferring the transformer substation to the communal property of the city, indicating the amount in the acceptance certificate that does not comply with the decision of the maslikhat and the additional agreement"* (emphasis in the original).
- 55 The Public Partner also relied on two provisions in the *Law on Public-Private Partnership*. The first is the limitation in Article 46(1-1) on the changes permitted in a public-private agreement: Response, §46. Article 46(1-1) provides that the conditions of a public-private partnership agreement specified in Article 46(1) *"can be changed by agreement of the parties only under the condition of positive budgetary efficiency (in monetary terms) of such changes"* and subject to *"the preservation (increase) of the economic and social efficiency of the public-private partnership project"*. The second, relied on to justify the postponement of the CIC for 2018 and 2019 to 2024 and 2025, is Article 9(4). Article 9(4) requires payment of CIC *"to be carried out after the commissioning of the public private partnership facility in equal shares over a period of at least five years"*. The Public Partner submitted that meant that *"payments must be made no earlier than five years, the requirement of earlier ones will be illegal"*: Closing, §13, page 10.



## **G Ruling on the placement in the State Order point**

- 56 Paragraphs 57-59 of the Public Partner’s response deal with its allegation that the Private Partner has not fulfilled its obligations under the PPP Contract to admit “*at least 100% of the capacity of the kindergarten within the framework of the state educational order for pre-school education/training*”. Relying on clause 94(1) of the PPP Contract,<sup>5</sup> the Public Partner submitted that the Private Partner has admitted children outside the state educational order’s framework.
- 57 The supplement to the Private Partner’s statement of claim received by the Court Registry on 13 July 2022 contained two responses to the question of the proportion of children to be placed under the state order. The first was a defence of mistake and that the Agreement contained contradictory terms because the calculations in the financial and economic model of the project (hereafter the “FEM”), which was annexed to, and an integral part of the contract were made on the basis of 33% placement in the state order. The second was that the significant delay in the start of the operation of the kindergarten caused by the lack of utilities and the adverse economic consequences and increased costs caused by the introduction of quarantine measures to prevent the spread of COVID-19 meant that the model with a state order of that percentage “*objectively cannot reach the rate of profitability specified in the FEM of the Agreement*”.
- 58 In its Opening submissions, however, the Private Party submitted that the issue of placement and proportion of children under the state order should not be considered in these proceedings. In §19 of those submissions, it submitted that the payments of CIC pursuant to clause 75 of the PPP Contract are not related to the percentage of public and private orders so that there is no causal relationship between payment of CIC and the numbers of children in the state order. Accordingly, see Opening §22, it maintained that the percentage of pupils admitted under the state order is a separate issue and not related to the substance of the Private Partner’s claim for the CIC. It submitted that this therefore does not affect the issue of paying the CIC and is a matter which is properly for a counterclaim under Rule 13.2 of the Rules of the AIFC Court. The Private Partner submitted that as the Public Partner did not file a counterclaim in time or apply to the court to file one out of time this matter should not be considered by the Court together with the Private Partner’s claim.
- 59 In part, this submission relied on one aspect of the Overriding Objective set out in Part 1 of the AIFC Court Rules 2018. Rule 1.6(3) requires the court to ensure “*that the case is dealt with expeditiously and effectively, using no more resources than are necessary*”. The Private Partner argued that it is not compatible with the requirement to deal with a case expeditiously using no more resources than are necessary for this court to deal with an issue not related to the substance of the Private Partner’s claim for the CIC where a counterclaim has not been properly brought. It therefore

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<sup>5</sup> §58 refers to clauses 23, 86 and 94(4) of the PPP Contract, but only clause 94(4) refers to 100%, although clause 92(7) also does so.

submitted that the Public Partner's claim concerning the percentage of pupils admitted under the state order should be left to an independent claim by the Public Partner, which it accepted the Public Partner had the right to file.

60 The Private Party also claimed that in negotiations on 15 September 2020, the parties resolved that *"after the commissioning of the PPP facility, ... the state order in the kindergarten will be placed at least 33[%] of the design capacity, the rest part the Private Partner organises on a private basis"*. The resolution was signed by the [then] head of the City's Department of Education, Mr. Sh. Kadyrova. This, it was argued, is consistent with an earlier letter dated 25 August 2020 from D Shoganbay, then the Deputy Head of the City's Education Department to the City's Chamber of Entrepreneurs. In that letter, Mr Shoganbay stated that according to the Concept of the PPP Project on the construction and operation of kindergartens in the city of Astana in 2016, approved in 2016, *"the state order in the kindergarten will fill at least 33% of the design capacity, the rest of the capacity the private partner organizes on a private basis"*. The Private Partner maintains, on the basis of this, that the parties *"had a clear understanding ... that the state educational order would be placed in the amount of 33%"*.

61 At the CMC on 18 October 2022, I heard submissions by the parties on this question and ruled that it should not be heard together with the Private Partner's claim. I accept the submission that the percentage of pupils admitted under the state order is not related to the substance of the Private Partner's claim for the CIC, does not affect the issue of paying the CIC and is properly a matter for a counterclaim under Rule 13.2 of the Rules of the AICF Court. This Court would not want to take an overly strict approach to questions such as the absence of a counterclaim or an application to file a properly particularised counterclaim. But, apart from any insufficiency of pleading, in this case the issue of what proportion of pupils were to be under the state order raises disputed factual issues which are insufficiently supported by evidence. This is illustrated by the letter signed by Mr Shoganbay on 25 August 2020 and the resolution signed by Mr. Kadyrova on 15 September 2020. Those factual issues in turn give rise to legal issues about whether the PPP Contract contained contradictory terms or whether the Public Partner is not able to rely on it for some other reason, such as an operative mistake. Those issues were not addressed in the documentation before me on 18 October 2022 or in the Public Partner's submissions. The procedural and evidential deficiencies in the way the Public Body raised the question of placement in the state order were unfortunate. My ruling did not preclude the Public Partner filing a claim against the Private Partner regarding the placement of children under a state order. It has not yet done so but must do so if it wishes to pursue this matter.

## **H The Witnesses of Fact**

62 On behalf of the Claimant Private Partner, the following individuals provided witness statements and were cross-examined at the hearing, giving their evidence through a Russian interpreter:



- (1) **Mr Zhanbolat Meldeshov** is a director of the Private Partner and Chairman of its Supervisory Board. He and Mr Almas Satylganov were project managers on the project for the construction of the kindergarten. Mr Meldeshov's evidence dealt with the tender, the effect of the failure to provide the necessary engineering infrastructure, and the efforts by the company with the Education Department and the Mayor of the City to get the public partner to provide the required transformer substation.
- (2) **Mr Almas Satylganov**, the other project manager, gave evidence dealing with the consequences of the site not being connected to a power supply with sufficient capacity. It covered delay and increase in construction costs, negotiations with the Education Department and the Akimat about the need to resolve the lack of a power supply, an approach to the Astana Regional Electric Grid company ("Astana REC JSC") and putting the facility into operation. His responsibilities included planning organisation and control of the process, relationships with contractors, suppliers, state partners, and other organisations involved in the construction. They included utility services and government bodies. He drafted the letters and notifications that were signed by Mr Meldeshov and sent to the Department of Education and to utility providers including the regional power generating company.
- (3) **Mr Vasily Semenovitch Kovalenko** is the head of production and the technical department of the "Nurbolat" Production Co-operative. "Nurbolat" was employed by the Private Partner as the general contractor for the construction of the kindergarten by a contract dated 25 September 2017. Mr Kovalenko's evidence covered the lack of an electrical power connection, how much power was required, attempts to develop options for connecting to other transformer substations, rental of generators and the impact of the electricity power issues on the timetable and the cost of construction.
- (4) **Mr Kuralgani Rakhimovich Amanzhholov** provided construction supervision on behalf of "Platan" LLP/JSC the firm employed by the Private Partner to provide technical supervision of the project. He visited the site frequently. His evidence concerned the consequences of what he said was a failure by the Public Partner to provide an electricity connection on timing and the costs incurred, and the attempts of the Private Partner to solve the problem. His evidence also dealt with issues concerning the registration of the land plot for the transformer substation and the acceptance of the substation.
- (5) **Mr Toleubay Askarov** is an executive director of Astanagorproekt-Sh LLP which provided Author's supervision from October 2019. By then construction had started, and Mr Askarov worked on the project, and finalised and approved the project documentation. His evidence concerned compliance with technical specifications and the requirements of construction legislation, the consequences of not bringing the engineering infrastructure to the connection points, and efforts

to resolve the issue of electrification of the kindergarten, including the construction of the transformer substation.

- (6) **Ms Akerke Mirambekovna Zhusupova** is the Chief Expert of the Laboratory of Special Studies at the Institute of Forensic Examinations in Astana. The Institute is a branch of the State Centre for Forensic Examinations of the Ministry of Justice of the Republic of Kazakhstan. Ms Zhusupova wrote a report, expert opinion No 89p, dated 22 April 2021 on the correctness of figures in two Certificates. The first Certificate dated 20 October 2020 concerned the book value of the kindergarten. The second Certificate dated 17 November 2020 concerned the Private Partner's investment costs.

63 On behalf of the Defendant Public Partner, the following individuals provided witness statements and were cross-examined at the hearing, giving their evidence through a Russian interpreter:

- (1) **Ms. Ekaterina Smyshlyueva** is Head of the Legal Department of the Astana Regional Electric Grid company ("Astana REC JSC"). Her evidence concerned the process for connecting to electricity networks and applications by the Private Partner in March and July 2018 and May 2019 for connecting electricity for the construction of the kindergarten and Astana REC JSC's response to them.
- (2) **Ms Gulzhan Dzhaksylykovna Aitzhanova** was at the material time Deputy Head of the City's Education Department and responsible for all PPP projects including this one. Her evidence concerned the transfer of the land to the Private Partner, the commencement and progress of construction, the decision in October 2019 to build a separate transformer substation, and whether the Private Partner provided documents for financial closure and complied with its reporting obligations under the contract.
- (3) **Ms Lyazzat Kasymbekova** is Head of the City's Department of Economics and Budget Planning. Her evidence dealt with the part played by her department in the planning, implementation and assessment of PPP projects, and the information, documents and reports on the project her department requested and received from the Department of Education. It covered the Project Concept for the construction and operation of kindergartens in Astana, whether there was a contractual deadline for providing the engineering infrastructure, the responsibility for failing to meet the time limits specified in the contract, and the impact of the fact that the criteria for selecting the best tender for a project included the percentage of places under the state order offered by a potential Private Partner.
- (4) **Ms Aliya Bikeeva:** Ms Bikeeva was formerly the Director of the Public-Private Partnership Department of "Astana Invest" which gave consultancy support to Astana City's Education Department for the kindergarten project. Her evidence concerned the *Concept* for the kindergarten project and the requirement that an

applicant making a tender offer to provide at least 33% of the kindergarten's places to for children taking places under the state order. She also stated that one of the criteria for selection of the best competitive application was the percentage of places offered to accommodate children under the state order, and the formula for calculating that percentage.

- (5) **Mr Diyarov Olzhas** is the Chief Specialist of Asset Management and Public Procurement of the City. His evidence concerned the process and documentation required for transferring Public-Private objects to is state or public ownership and, in this case, the process for transferring the kindergarten and transformer substation to the communal property of the City.

## **I The Expert Evidence**

64 The parties also adduced expert evidence on Kazakhstan law:

- (1) For the Private Partner, **Dr Elena Nesterova**. Dr Nesterova is candidate of legal sciences, an Associate Professor at the Adilet Higher School of Law at the Caspian University in Almaty, a partner in the law firm United Consultants LLP and Chief Researcher at the Institute of Legislation and Legal Information of the Ministry of Justice of the Republic of Kazakhstan. She has provided expert opinions on Kazakhstan law in international arbitrations and proceedings in foreign courts. She has also provided opinions on the interpretation and application of civil law for the Constitutional Council of the Republic of Kazakhstan and business entities. Her signed report is dated 22 June 2022 and has supporting material annexed to it.

- (2) For the Public Partner, **Mr Gennady Privalov**. Mr Privalov is an advocate and a member of the Bar Association of the City of Astana. He has had a licence to practice law since 1999. Before then he was a lawyer-adviser to Agrosnab JSC, a legal consultant to the Akmola department of transport inspection, an assistant to the Akmola Transport prosecutor, Deputy Aviation Transport Prosecutor of the City of Astana, and a chief specialist of the Department for Control and Protection of Entrepreneurship. Mr Privalov's a signed report is dated 17 October 2022. Responding to a question by me at the end of his oral evidence, he said that he is a civil law expert but that in his professional life he had also dealt with administrative law and criminal law.

65 Dr Nesterova and Mr Privalov were asked to give expert opinions on the interpretation of the obligations of both parties under the PPP Contract under Kazakhstan law and whether the parties had complied with those obligations. After their Reports were exchanged, they met and prepared a Joint Memorandum (hereafter "JM") dated 4 November 2022 which identifies and summarises the matters on which they agreed and those on which they were unable to agree. Their views are summarised in the Appendix to this judgment. At the hearing they gave

oral evidence and were cross-examined. Dr Nesterova's evidence was given via video-link.

## **J Discussion and Conclusions on the Disputed Issues**

### **(i) When was the plot provided?**

- 66 The period of 60 days specified by clause 7 of the PPP Contract from the date the contract came into force on 1 June 2017 for the provision of the plot expired on 1 August 2017. The issue is whether the plot of land was provided when the Public Partner permitted the Private Partner to enter and start construction or when it granted the Private Partner the right to lease the plot. The latter point is linked to the question, considered at [79] ff, whether the obligation to provide the plot only arose when financial closure occurred. Although in the evidence and submissions, time was spent on when the plot was provided to the Private Partner, it will be seen that the more important question is whether the Public Partner was in breach of its obligation to provide engineering infrastructure, in particular electrical power infrastructure. That question is considered at [91] ff.
- 67 The following facts relevant to the provision of the plot are not in dispute. On 4th July 2017 the Public Partner was granted the right to lease the plot in the area of the intersection of streets with project names No. 29 and No. 36 by Decree No 197-1352 of the Akimat of the City of Astana.
- 68 On 12th July 2017 the City of Astana's Department of Land Relations and Control and Protection of Land in Astana concluded an agreement with the Astana City Education Department "*for temporary gratuitous land use (lease) for a period of 10 months*" of the plot for the purpose of landscaping.
- 69 On 2 March 2018 the Public Partner notified the Office of State Architectural and Construction Control State Institution of the city of Astana of the commencement of the implementation of construction activities for the kindergarten to be built on the plot and received a coupon for the receipt of the notification, with the registration number of HKMZH -41. There is no reference to the Private Partner on the coupon which was signed by the Public Partner.
- 70 On 18th April 2018 the City Commission on granting rights to land plots in Astana city granted the Private Partner the right to lease the plot: see Minutes No. 11 signed by A. Amrin, the Commission's Chairman, and the Deputy Akim of Astana.
- 71 The Public Partner's case is that the Private Partner was provided with the plot by the agreement on temporary gratuitous use dated 12 July 2017: Public Partner's Closing, §3, page 4. Its alternative submission, considered at [79] ff., is that it was not obliged to take all necessary measures to provide the plot until financial closure had

occurred: Public Partner's Opening §6 and Closing §2 page 3, and the evidence of Ms Aitzhanova, who at the time was responsible for all the City of Astana's PPP projects.

- 72 The Public Partner's primary submission relied on the evidence of Ms Aitzhanova and Ms Kasymbekova who relied on the agreement on temporary gratuitous use dated 12 July 2017. In cross-examination, when shown that document, Ms Aitzhanova accepted that document showed the land was in fact provided by the City to the Public Partner. Ms Kasymbekova accepted in cross-examination that she had relied on a report received from the Public Partner which referred to the document dated 12 July 2017. Ms Aitzhanova also stated that without the decision taken on 18 April 2018 and recorded in Minutes No. 11, the Private Partner could not start construction and that decision could not have been taken earlier because documents showing financial closure had not been provided, a matter I consider at [79] ff.
- 73 It was also submitted by the Public Partner that the requirements of clause 7 were satisfied from the time the Public Partner urged the Private Partner to start construction or from the time that construction started in March 2018.
- 74 The significance of March is that it was then that the Public Partner notified the Office of State Architectural and Construction Control State Institution of the City of Astana of the commencement of construction activities and was sent a "coupon" acknowledging receipt of the notification. The relevance of the Office of State Architectural and Construction Control is that Article 68(2) and (12) of the Law on Architectural, Town-Planning and Construction Activity in the Republic of Kazakhstan dated 16 July 2001 No. 242 respectively provide that in the case of a customer intending to build an object who has the "*appropriate land right*" "*no additional decision from local executive bodies of districts (cities) is required*" and that "*prior to the commencement of construction ... the customer is obliged to notify bodies carrying out state architectural and construction control of the beginning of performance of construction ...*".<sup>6</sup> In this case, the coupon was signed by the Public Partner and not the Private Partner because at that time the Private Partner did not have rights to the land plot.
- 75 I have concluded that what clause 7 of the contract requires is the grant of a right rather than a mere permission to enter and work on the land. It is true that clause 7 states only that the obligation of the Public Partner is "*to take all necessary measures in accordance with the law to provide the private partner with a land plot for the construction and operation of a PPP facility*". It does not expressly refer to the Private Partner having the legal right to use the land plot. Nevertheless clauses 9 and 10 and 12 suggest that what the contract contemplates is a legal right.

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<sup>6</sup> The basic definitions used in the law are set out in Article 1. Article 1(56.3) defines "*customer*" as "*an individual or legal entity operating in accordance with the legislation of the Republic of Kazakhstan on architectural town planning and construction activities. Depending on the purpose of an activity, a customer may be a customer investor of a project programme, customer owner, developer or their authorised persons*".

- 76 Clause 9 provides that the land is to be provided on terms of temporary gratuitous use. Clause 10, which precludes the Private Partner from transferring its rights to the plot to other persons, assumes that it has rights and not a mere permission. Clause 12 provides that where the Private Partner *“is not granted the right to use the land plot within the terms specified in the contract through no fault of the Private Partner, and for this reason ... cannot start construction ... [it] Is entitled to extend the term of the construction of the PPP facility.”*
- 77 Accordingly, the plot was transferred to and thus provided to the Private Partner on 18 April 2018. Unless the Public Partner’s argument that its obligation to take all necessary measures to provide the plot only arose after financial closure which had not occurred is correct, which I consider at [79] ff, this was ten months after the contract came into force rather than the 60-day period specified in clause 7 for the Public Partner to *“take all necessary measures”* to provide the Private Partner with the plot.
- 78 I conclude by observing that in cross-examination Ms Aitzhanova stated that without being provided with the right to lease the land the Private Partner could not start construction. This may reflect the strict legal position but, in this case, it did not reflect the factual reality because it was common ground that construction started in March 2018: see for example JM, section 4.

***(ii) The relevance of financial closure to the obligation to provide the plot and the start of construction:***

- 79 As stated at [27], clause 4 and Appendix 2 of the contract as amended provided that financial closure was to be within two months of the date of the contract, that is before 29 July 2017. One of the Public Partner’s arguments was that the obligation to provide the plot only arose after financial closure, which in this case was delayed because the Private Partner did not provide written notification that it had the right to access the financing necessary for the construction of the kindergarten, as was required by clause 1(13) of the contract.
- 80 The first question is therefore is whether the obligation to take all necessary measures in accordance with the law to provide the plot did only arise after financial closure. In my judgment, it clearly did not. Article 392 of the Civil Code provides:

*“When interpreting provisions of an agreement, the court shall take into account the literal meaning of the words and expressions contained in it. The literal meaning of a provision in of an agreement, where unclear, shall be established by way of comparing that with other conditions and the sense of the agreement as a whole.”*

- 81 Clause 7 of the contract specifies that all necessary measures to provide the plot must be taken within a period of 60 days from the date on which the contract comes into force. Clause 7 does not refer to financial closure and the reference to a period from the date on which the contract comes into force reflects an express choice to use that rather than financial closure as the period by when the necessary measures to provide the plot must be taken. Clause 155 provides that the contract comes into force from the moment of its public registration with the relevant registration authority which in this case was 1 June 2017. The literal meaning of clause 7 is that the obligation to take the necessary measures to provide the plot arose on 1 June 2017 and the period for compliance ended on 1 August 2017.
- 82 There is no ambiguity in clause 7, but had there been, it is clear from Article 392 of the Civil Code that, as the experts agreed, the meaning of particular words is determined by comparison with other conditions in the contract and its meaning as a whole. In this case, Clause 7 is to be contrasted with clause 157 where the construction period is defined as a period from the date of financial closure. It thus appears from clause 157 that where the parties wished to define an obligation by reference to financial closure, they did so expressly.
- 83 In any event, although the documents before the court do not include a written notification by the Private Partner that it had the financing necessary for the project there is no evidence that it did not. Indeed, the evidence points the other way.
- 84 When submitting its tender on 20 December 2016, the Private Partner provided notarised documents confirming its compliance with the qualification requirements. These included the availability of money amounting to 10% of the cost of the project in its accounts and a letter from the JSC Bank of Astana, Astana branch. It was confirmed by Ms Aitzhanova that the Private Partner met the qualification requirements for the tender. She, however, described the bank's letter as only confirming readiness to provide financing if the tender succeeded: it was, she stated, a letter of intent rather than actual money. Although this is strictly true, fulfilling the qualification requirements indicated that the Private Partner was likely to have the necessary financial means to start construction should its tender succeed.
- 85 On 24 November 2017 the Private Partner transferred 16,873,651 KZT to the "Nutbolat" Production Co-operative as a prepayment for building materials. Moreover, a document disclosed only at the start of the hearing showed that on 30 November 2017 the Private Partner and "Nurbolat" entered into a non-revolving Credit Line in the amount of 360,000,000 KZT with SB Sberbank JSC, for which it provided security in the form of a number of non-residential buildings, a cash deposit of 120,000,000 KZT and a number of guarantees. In his oral evidence, Mr Meldeshov stated that the Private Partner disclosed this loan to the Public Partner. He also stated that *"regarding the financial closure, the State Partner has never ... raised any issues, because from the very beginning, all the funding was confirmed, we confirmed that we [were] prepared to start construction with our own financing, ... there were no financial issues whatsoever"*. I do not accept the Private Partner's explanation for



the very late disclosure of this document, that it had only just received it and the bank's permission to disclose it, but there was no challenge to the authenticity of the document.

- 86 While, as Ms Aitzhanova stated, it was not the responsibility of the Public Partner to request the Private Partner to provide a report on financial closure, I note that there is also no evidence that, prior to these proceedings and at any stage during the construction period, the Public Partner made any complaint that the Private Partner had not notified it of financial closure. The Public Partner was entitled to *"unhindered access to ... documentation related to the implementation of activities under the PPP project"* and to *"require information ... about the construction ..."*: clauses 91(2) and (6) of the contract. It did not avail itself of these rights. Moreover, clause 101 provides that if, while monitoring the Private Partner's compliance with the contract, the Public Partner detected violations *"that may significantly affect the Private Partner's compliance with the terms of the contract"*, it should request in writing that the violations be eliminated within 30 days, or a period agreed by the parties. That was not done either in respect of financial closure or the reports and documents required by clause 100. What happened was that the construction proceeded, and the kindergarten and transformer substation were accepted into operation by the Public Partner in its Commissioning Certificates dated 7 and 8 October 2020, after which over 909,000,000 KZT was paid to the Private Partner: see Private Partner's Opening, §§ 3.3 -3.4.
- 87 As to the loan by Sberbank, the Public Partner submitted in its closing that the loan did not show that the Private Partner had raised the financing required for the project and thus achieved financial closure. This was because the loan was for only about 25% of the investment costs (CIC) of 1,688,648,570 KZT stated in clause 73 of the contract and not for 90% of the costs as specified in Appendix 4. It stated that *"this eloquently indicates that at the time of the conclusion of the contract, as well as at the beginning of construction, evidence for raising 1,688,648,570 KZT was not provided to either the defendant or the court"*: Closing §2 page 3.
- 88 Since financial closure refers to a written notification by the Private Partner, on the evidence before me it is not possible to say exactly when it occurred. In view of my conclusion on the meaning of clause 7, it is not necessary to decide when it occurred because it is not necessary to decide whether the obligation to provide the plot only arose after financial closure. What would the position have been had it been necessary to decide the question?
- 89 The evidence before me is not entirely clear, but I consider that, had it been necessary to decide the question, there is sufficient evidence to have enabled me to make one of three inferences. The first is to infer from the evidence and findings summarised above that financial closure did occur before the plot was provided. The second is that, if financial closure had not occurred before then, the reason was that the Private Partner did not have rights to the plot until April 2018. The Public Partner, which had those rights before then, notified the Office of State Architectural and



Construction Control about the commencement of construction on 2 March 2018, when it is common ground that construction started. The third possibility is based on the conduct of the Public Partner in encouraging the Private Partner to commence construction, and then notifying the Office of State Architectural and Construction Control but not raising the question of financial closure until after the commencement of these proceedings. I consider that conduct would preclude the Public Partner from relying on this point, in a similar way to the way, in a common law system, the principle of estoppel precludes a person from relying on its strict rights.

- 90 Accordingly, I reject the Public Partner’s submission that the delay in the start of construction was caused by a failure of financial closure for which the Private Party was responsible.

***(iii) Engineering infrastructure: what was done to connect the plot to the connection point of the electricity network, and whose responsibility was it to do so?***

- 91 By clause 8 of the contract, the engineering infrastructure, including electricity, “***must be connected to the land plot to the connection points***” (emphasis added). This requirement is clear and express. At the time the plot was provided to the Private Partner, there was no electricity connection between it and the electricity connection points because the Public Partner’s original plan for the connection point to be provided from a transformer substation which was to be built on a nearby site proposed for another kindergarten did not proceed.
- 92 The Private Partner’s pleaded case is that it took all measures to resolve the electricity supply issue as soon as possible and that it repeatedly sent notification letters and appeals to the Public Partner which did nothing to resolve it. The documents initially filed in support of this part of its pleaded case date only from 21 August 2020, but the material before me includes earlier documents which were subsequently added to the case file as well as the evidence of a number of the witnesses.
- 93 The Public Partner’s position, supported by Mr Privalov’s opinion, is that it was not in breach of the contract. This it submitted is because the Private Partner was aware that it would be necessary for electricity to be connected to a temporary connection point during construction but did not raise the issue at the beginning of construction. The Public Partner originally claimed that the Private Partner did not formally complain until August 2020 but by the time of the hearing it maintained that the first letters of complaint were those to it from the Private Partner dated 8 and 19 June 2018: see for example § 2 of page 4 of Mr Privalov’s opinion.<sup>7</sup>

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<sup>7</sup> The Private Partner’s Opening Submissions err in stating §§12 and 14 that it notified the Public Partner of the problem in obtaining an electricity supply seven days after signing the PPP Contract. The Contract is dated 29 May 2017 and the letter relied on is dated 8 June 2018.

- 94 The Public Partner also relied on the fact that the Private Partner took independent steps to obtain a connection point for the tie-in and did not use those made available by the electricity company, Astana REC JSC, at the airport site or by “Expo Town Success”, a housing construction co-operative which owned the “Vienna Quarter” connection point. The diesel generators were leased from two entrepreneurs between January and December 2019 after the technical specifications to the airport connection point had been provided in March 2018 but not taken up and the Public Partner is not liable to reimburse the Private Partner for them: Closing, § 6.
- 95 The third limb of this part of the Public Partner’s argument was that the dispute concerning the connection to the electricity infrastructure was resolved by later decisions and the two Supplementary Agreements made in December 2020 and September 2021. Those agreements modified the PPP Contract by providing for the Private Partner to construct a transformer substation and allocated funds at the CIC specified in the agreements. The Public Partner submitted that the Private Partner is not entitled to recover the 492,157,728 KZT it claims as additional expenses because of the increase in its estimated costs: Closing, § 8.
- 96 Evidence about the position on electricity infrastructure was given on behalf of the Private Partner by Messrs Meldeshov, Kovalenko, Amanzholov, Satylganov, and Askarov. Evidence on behalf of the Public Partner was given by Ms Smyshlyaeva, Head of Legal Services at Astana REC, and Ms Aitzhanova, at the material time Deputy Head of the City’s Education Department and responsible for all its PPP projects.
- 97 I first set out my findings of fact. It is, as I have stated, common ground that construction started in March 2018. It is clear from the documentation and the evidence of Ms Smyshlyaeva, that, on 27 March 2018, the Private Partner applied to Astana REC for an electrical connection for the construction of the kindergarten. On 30 March 2018 Astana REC offered the Private Partner a connection point at the airport substation. Ms Smyshlyaeva stated that where construction was going on it was Astana REC’s practice to enable the construction activity by giving the applicant the closest and most cost-effective connection point. She said that, at the time, that was the airport substation. She also stated that the Private Partner did not follow this up and did not use the specifications. It was not said by her or by the other witnesses whether, and if so how, the Public Partner was involved in this application.
- 98 The Private Partner gave several reasons for not using the technical specifications issued on 30 March 2018. The first was that the airport was too far from the site. Ms Smyshlyaeva accepted in cross-examination that the airport substation was far away from the kindergarten. But she stated that the Private Partner did not have to connect to the airport substation itself. There was, she stated, a transmission line from the substation and a pylon close to the plot which the Private Partner was supposed to use as its connection point. The second reason was that the technical specifications issued by Astana REC’s chief engineer required the construction of electric transmission lines and an integrated transformer substation.

- 99 A third possible reason appears from two letters from the Private Partner to the Public Partner dated 8 and 19 June 2018. Those letters refer to the substantial payments demanded by the owners of the transformer substations for which Astana REC had issued technical conditions and the fact that lack of a temporary power supplies made it difficult to perform construction work or to meet the construction period specified in the contract.
- 100 There is a sharp conflict in the evidence concerning the position between March and June 2018. The Public Partner's case was that the Private Partner did not raise the issue at the beginning of construction. Ms Aitzhanova stated that no letters or notifications had been provided by the Private Partner since the beginning of the contract. Although this may primarily have been a reference to the documents required by Appendix 5 to the contract, those included construction reports, which would encompass reports about the effect of the absence of a connection to the electricity grid.
- 101 As to the witnesses for the Private Partner, in cross-examination Mr Meldeshov stated that the Public Partner told the Private Partner that it was for it to find a tie-in to the electrical grid, effectively saying *"just go ahead and look for any tie-in, that's on you"*. He also stated that they brought the difficulties in getting the electricity power needed for construction to the Public Partner from Day 1. Responding to a question by me, he said that he personally talked to Ms Aitzhanova. Mr Satylganov stated that he had repeatedly raised the issue of the urgent need to resolve the acute issue of electrification at different levels, including directly with the heads and deputies of the Public Partner, the Akims and their deputies but that they *"received no effective assistance during the construction period"*: Statement, §§ 12-13. Mr Meldeshov and Mr Satylganov's evidence that they had raised the electricity issue with the Public Partner was not challenged by Mr Elamanov.
- 102 Mr Kovalenko's evidence was that they went to the power supply company with this issue *"but there were constant delays ... first of all, probably because of the inactivity of the Public Partner"*. He and Mr Amanzholov, who was responsible for technical supervision, also said that because no electricity connection was provided by the Public Partner they did not connect to permanent grids and had to rent diesel generators.
- 103 At some stage, it is not clear from the evidence exactly when, the Private Partner sought to connect to substations located in the "Vienna Quarter". The substantially unchallenged evidence of Mr Amanzholov and Mr Kovalenko was that the Vienna Quarter had insufficient spare capacity of the 150-200 KW needed and that Buldirshin's attempts to obtain a connection there were at first refused *"citing the lack of free capacity"*. Mr Kovalenko also stated that *"the Private Partner provided electricity under a temporary connection scheme from the neighbouring construction site of the residential complex Vienna Quarter with a capacity not exceeding 15 to 20 kW, but the provided capacities were only enough for the needs of the administrative*

office” and not for the construction work: see statement, §13. His evidence was that the lack of sufficient electrical power led to significant delay to the construction. Mr Meldeshov stated that they notified the Public Partner of the refusal by the construction company which owned the Vienna Quarter’s connection point to give permission to connect because it did not have surplus capacity. He also stated that the connection to the Vienna Quarter’s connection point which was insufficient for construction purposes was obtained without any assistance from the Public Partner.

- 104 What the documents show is that on 13 July 2018 the Private Partner applied to Astana REC to enable it to resolve the problem of power supply by transferring the technical specifications previously issued for the substation that had been planned to be constructed at the intersection of Ryskulov and No 36 streets which had not proceeded. But in a letter dated 17 July 2018, S Menkin, First Deputy Chairman of Astana REC’s Management Board for Production replied returning the application. He stated this was because *“a request for the issuance, extension and modification of technical specifications is submitted by the customer (stated institution and Department of Education of Astana city) for the design and construction of the facility. Considering the above, due to the absence of the customer’s application, we are forced to return your application ...”*. Ms Smyshlyaeva stated that the problem was that the Private Partner had not provided documents confirming its entitlement to request the connection and that the owner of the connection point had agreed to the application. She also pointed to the statement in the last paragraph of the letter which stated that the technical conditions would be changed *“upon repeated application... with a full package of documents and if the owner of the networks agrees ...”*.
- 105 At times the evidence of Messrs Meldeshov, Kovalenko, Amanzholov, Satylganov and Askarov on this question and the inactivity of the Public Partner was general and did not refer to specific documents. There is, however, support for it in the two letters dated 8 and 19 June 2018 to which I have referred. In those letters the Private Partner set out the problem caused because of the non-construction of the transformer substation that was to have been constructed on the nearby site. In the first it referred to the difficulties it faced in getting a temporary power supply and asked the Public Partner *“to coordinate the issue of issuing a consolidated plan of external engineering networks for the facility”*. In the second, it asked the City *“to consider transferring the Design and Estimate Documentation for the Transformer Substation in full, as an addendum to the existing contract, so that this transformer substation will be included in Lot No. 5 on a legal basis as an annex to contract No. 1 dated May 29, 2017”*. It was thus in June 2018 that it first proposed what between 2 and 3 years later became Supplementary Agreements No 1 and No 2.
- 106 It is telling that on the question of electricity infrastructure and what information the Private Partner had given to the Public Partner neither Ms Aitzhanova’s brief statement nor her oral evidence refer to these letters. Her statement said only that: *“Regarding power supply, the facility was connected to the power supply network to the neighbouring Vienna Quarter residential complex under construction at the*

*request of the Akimat, but it was only in 2019 that the question arose that for further normal functioning, taking into account the existing capacities of the residential complex's power supply network, it was necessary to build a separate TS that was not included in the project...".*

- 107 There is, moreover, not a single document before the court evidencing a request by the Public Partner or the Akimat to provide a connection to electrical infrastructure either in the Vienna Quarter or elsewhere. This is also telling in view of the requirement in clause 8 of the contract that the plot must be connected to the engineering infrastructure's connection points and the statement in the Public Partner's Additional Opening Submissions, dated 8 November 2022, that *"it is impossible to get a connection point bypassing the State Partner"*.
- 108 Ms Aitzhanova appeared to be unaware of any of the problems with electricity supply in 2018 and erred in stating that the question of electricity and the need to build a transformer substation only arose in 2019. In her oral evidence she also stated that she was unaware of how many kilowatts the Vienna Quarter was able to provide for this construction. She stated that none of the reports Appendix 5 of the PPP Contract required the Private Partner to submit had been received. She had never requested them or complained about the Private Partner not providing those documents because it was not the Public Partner's responsibility to remind the Private Partner of its obligations.
- 109 As to what happened in 2019, on 28 May 2019 the Private Partner submitted a further application for temporary specifications for an electrical connection for the construction of the kindergarten. Ms Smyshlyaeva stated that on 6 June 2019 the Private Partner was provided with specifications for the Vienna Quarter residential complex's connection point but again it did not fulfil the conditions.
- 110 The steps the Private Partner had requested in the letters of June 2018 were the subject of an appeal by it to the Competition Commission. On 11 October 2019 a meeting of the Competition Commission and the Commission for Direct Negotiations on the implementation of the PPP project decided and recorded in a protocol that an additional agreement should be concluded with the Private Partner. It was decided that the terms for the commissioning of the kindergarten should be extended and the payment schedule for the payment of CIC should be postponed. It was also decided that the Private Partner should be instructed to construct and commission a transformer substation and electric grid line and to prepare documents containing the cost of the additional work.
- 111 On 5 November 2019 the Private Partner re-applied for new technical specifications and informed Astana REC that it was cancelling the previous specifications. The letter stated that this was because Expo Town Success, which owned the Vienna Quarter's connection point, had *"requested significant amounts of compensation through their networks"* for which Buldirshin 2012 would not be compensated by the State upon completion of the construction.

- 112 The Private Partner was provided with a land plot for the transformer substation by Akimat Resolution 510-1524 dated 14 November 2019. During December 2019, updated design and estimate documentation for the substation was prepared. Work on it started in January 2020 and was completed in September 2020: see Mr Askarov's statement, §§ 11-14. The construction was undertaken by the Private Partner on the basis of the protocol decision at the meeting of 11 October 2019 but without the additional agreement specified in the decision at that meeting.
- 113 While construction was underway, there were further negotiations about the Private Partner's estimate of the design and construction costs of the transformer substation and about additional costs it claimed to have incurred because the Public Partner had not provided a plot connected to the electricity supply networks. I deal with the claim for the additional costs at [161] – [169]. The Private Partner provided its estimates of the additional cost of the work for constructing the transformer substation for a meeting of the PPP Commission on 10 February 2020. At that meeting the Commission decided to submit those figures for budgetary approval. These decisions were eventually reflected in Supplementary Agreement No 1 made in December 2020 which *inter alia* provided for extending the period for the commissioning of the kindergarten and for additional work for the construction of a transformer substation. They were also reflected in the amendment to clause 73 of the PPP Contract made by Supplementary Agreement No. 2 in September 2021.
- 114 In summary, I have concluded that that the Private Partner gave the Public Partner written notice of the power supply problems in June 2018. On the basis of the evidence of Messrs Meldeshov, Kovalenko, Amanzholov and Askarov, I consider that before then they also communicated more informally with the Public Partner about the problems. I accept the evidence that they were told to look for a tie-in themselves and as to the inactivity of the Public Partner. There is no evidence that the Public Partner took any steps to provide an electricity connection point for the Private Partner or assisted it in its efforts to do so. Despite its obligations under clause 8 of the contract, it appears to have left it to the Private Partner to sort out the problem. The Private Partner's efforts did not succeed. One of the owners of the two transformer substations for which specifications were issued initially had no excess capacity. Both of them required substantial compensation from the Private Partner which it considered it would not be able to recover from the Public Partner.

**(iii) Conclusions on breach:**

- 115 The Public Partner's response to the claim maintained that the provision of the plot without the infrastructure connections did not entitle the Private Partner to a penalty or compensation. It submitted that "*clause 16 of the [contract] states only about untimely provision of the land plot without reservation of engineering networks*" but "*the land plot was provided... on time according to [Appendix] 3 to the [contract]*": Response, §33. I can deal with this submission briefly. Although the



response only refers to clause 16, clauses 12-15 also make provisions about delay or failure to provide the plot. The Public Partner's submission overlooks the fact that clause 8 of the contract states that "the engineering infrastructure must be connected to the provided land plot". It is also inconsistent with other provisions of the contract and provisions of the Civil Code to which I turn.

116 On the issues of contract and construction law which arise on this question, the legislative starting point is the *Civil Code* and the material provisions on contracts of work and labour in Chapter 32 of that Code. The provisions relevant to this issue are in the third part ("paragraph 3") of Chapter 32, "*Features of Construction Contract*". In the context of this PPP Contract the references in the three provisions set out below to "the contractor" are to the Private Partner, and the references to "the customer" are to the Public Partner.

117 Article 651(1), headed "*Construction Contract*", provides:

*"Under the construction contract the contractor agrees in the original terms according to the customer to build a specific object or perform other construction work, and **the customer agrees to provide the contractor with the necessary conditions for the performance of work**, accept the result and pay for it at the agreed price". (emphasis added)*

118 Article 658, headed "*Providing the Land Section for Construction*", provides:

*"**The customer shall be obliged to provide land for the construction in such area and state as indicated in the contract.** In the absence of such instructions in the contract, the area and the state of the land should ensure the timely start of work, their normal maintenance and completion on time." (emphasis added)*

119 Article 659, headed "*Additional Duties Of the Customer in the Contract for Construction Work*" provide:

*"**The customer is obliged in the cases and in the manner prescribed by the contract for construction work**, to transfer to the contractor for the use needed buildings and facilities, **to ensure** the transportation of goods to the contractor, **the temporary power supply networks**, water and steam lines, and provide other services. Payment shall be made on the terms stipulated in the contract." (emphasis added)*

120 The obligations imposed on the "customer", in this case the Public Partner, by Articles 651, 658 and 659 of the Civil Code are thus respectively to "*provide the contractor*", in this case the Private Partner, "*with the necessary conditions for the*

*performance of work*” (Article 651), with *“a land plot in such ... state as indicated in the contract”* (Article 658), and to *“ensure the temporary power supply networks”* (Article 659).

- 121 The two provisions of the contract in this case which are relevant to this issue are clauses 8 and 104. Clause 8 expressly and clearly requires the engineering infrastructure to the connection points to be connected to the land plot provided. Clause 104 sets out the distribution of risks agreed on by the Parties. Clauses 104(11) and (12) assign the risk of *“untimely supply of engineering communications”* and *“changes to plans proposed by local authorities or other government bodies”* to the *“Public Sector”*.
- 122 I have summarised the Public Partner’s submissions on this issue at [78] and [93] – [95]. In this and the following paragraphs I consider them more fully and give my reasons for rejecting them. The first limb of the Public Partner’s submission was that there was no breach of contract. The Private Partner was aware of the need for electricity to be connected to a temporary connection point but did not raise the point at the start of construction. I reject this submission. The Public Partner was either aware of the lack of an electricity connection point or should have been. The language of clause 8 is unqualified in requiring the Public Partner to provide the plot with the connection and the contract does not require the Private Partner to notify the Public Partner or raise the point at the start of construction.
- 123 Clause 36, upon which the Public Partner primarily relied, does not in fact support its case. Clause 36 makes provision for *“circumstances beyond the control of the Parties that make it impossible to construct and commission the PPP facility within the [stipulated] time limit”*. But the contract assigned the obligation to supply the necessary infrastructure, including electricity infrastructure, to the Public Partner. It also assigned the risk of untimely supply of such infrastructure on the Public Sector, that is the Public Partner. The Public Partner’s original plan was that the plot’s electricity connection point would be the transformer substation on the site on which another kindergarten would be built under another PPP project. It thus knew or should have known that the other project did not proceed because there were no bidders, and that circumstance left the plot with which these proceedings are concerned without the necessary electricity infrastructure.
- 124 In his report, Mr Privalov relied on the obligation of the parties *“immediately”* to notify each other of the occurrence of significant events that may affect the proper performance of the obligations under the contract in clause 102. I have concluded that clause 102 does not assist the Public Partner in the circumstances of this case.
- 125 First, I have found that the Private Partner informally brought the problems caused by the lack of an electricity connection point to the attention of the Public Partner before the two letters dated 8 and 19 June 2018.



- 126 Secondly, the first of the June 2018 letters was written within the 10-day period from the end of the first reporting period after the beginning of construction on 2 March 2018. Even if it did not strictly satisfy the requirement in clause 100 and Appendix 5 No 16 in respect of construction reports, it and the subsequent letter put the Public Partner on notice of this problem at an early stage.
- 127 Thirdly, even if the Private Partner should have done more, the obligation under clause 102 does not negate the breach of clause 8 and the information was known to, or should have been known to, the Public Partner. The application of clause 102 to the present circumstances does not sit comfortably with clauses 104(11) and (12) which allocate the risks of untimely supply of engineering communications and changes to plans proposed by local authorities or other government bodies to the Public Sector. The supply of engineering infrastructure to the plot of land provided upon which the kindergarten was to be constructed was completely dependent on the Public Partner and, as Dr Nesterova stated in the summary of her views in the Joint Memorandum, is included in the zone of its obligations.
- 128 The second limb of the Public Partner's case on this issue is that the Private Partner took independent steps to obtain an electricity connection point and did not make use of the connection points for which Astana REC had provided technical specifications. I do not consider that an innocent party who takes steps in an attempt to mitigate the loss caused by a breach of contract by the other party is precluded from relying on the breach of contract, particularly where those steps are reasonable ones designed to reduce the losses caused by the breach.
- 129 Moreover, the contractual obligation that *"the engineering infrastructure must be connected to the provided land plot to the connection point"* did not envisage that the Private Party would pay for the connection, whereas the owners of the connection points for which Astana REC provided technical specifications required substantial payments from it. Under the PPP Contract, the Private Partner would not have been able to claim reimbursement of any payments to the owners of the connection points. In those circumstances, I do not consider that its conduct in not proceeding with the technical specifications offered preclude it from relying on the Public Partner's breach of contract.
- 130 The third limb of the Public Partner's case on this issue is that the dispute about the lack of a connection to the electricity connection point was settled by the Supplementary Agreements which modified the PPP Contract by providing for the construction of the transformer substation and by allocating the funds specified in those agreements. It is misconceived. Paragraph 5 of Supplementary Agreement No 2 expressly provides that paragraphs 1 and 2, in which the amounts of CIC are set out, *"do not limit the rights of a private partner to compensation for losses payments and increases [in] the compensation of investment costs associated with the increased in the cost of the project, other costs and lost profits in accordance with the norms of the current legislation of the Republic of Kazakhstan and the agreement"*.

- 131 I also reject the submission summarised at [55] that the changes did not meet the requirements of Article 46(1-1) of the Law on Public-Private Partnerships. What occurred here were not simple “changes” in the terms of a PPP agreement by the parties. The changes that were made in the Supplementary Agreements reflected the October 2019 recommendations and decisions of the PPP Competition Commission, a body responsible for regulation of PPP Contracts. The Agreements sought to address the consequences of the Public Partner’s failure to provide the necessary infrastructure connection, i.e. the consequences of what I have found to be a breach of contract by the Public Partner. They did so by adjustments recommended by the PPP Competition Commission and, after further negotiation, agreed by both parties because performance of the contract within the original timescale was impossible.
- 132 The Public Partner’s submission also appears to seek to apply Article 46(1-1) to the operation of the remedies for breach of contract provided for in a PPP Contract or by the Civil Code. Both the PPP Contract and the Civil Code make provision for remedies for breach. The contract was awarded after a tendering process, although in this case this Private Partner was the only bidder. It was not suggested by the Public Partner that when the contract made it did not satisfy the principles of balance, mutually beneficial distribution of responsibilities, risks, and revenues between the Public Partner and the Private Partner in Article 3.2(3) of the Law. The PPP Contract with the provision for those remedies was entered into after the approval of the relevant authorities. I have concluded that in these circumstances it cannot be said that Article 46(1-1) applies to and precludes the operation of the remedies for breach of contract provided for in a PPP Contract or by the Civil Code.
- 133 I also reject the submission in relation to the unpaid CIC for 2018 and 2019 based on Article 9(4) of the Law on Public-Private Partnerships. Article 9(4) requires that reimbursement of the CIC *“shall be made after the launch of the public private partnership facility in equal instalments over a period of at least five years in line with the public private partnership”*. The schedule in Appendix 6 to the PPP Contract provides for payments over a 6-year period from 2018, at a time when the contract provided that the construction period was to end in December 2018 so that payments were scheduled to start after the launch of the facility.
- 134 Supplementary Agreement No 1 extended the construction period to 1 October 2020 but only changed the amounts of CIC for 2020 and 2021.<sup>8</sup> It left the figures for the other years unchanged. It did not change the start date for CIC reimbursement, and provides that *“the remaining clauses of the Agreement not affected by this Supplementary Agreement remain unchanged and the Parties confirm their obligations under them”*. There is a similar saving for unaffected provisions of the

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<sup>8</sup> Clause 8 changed the figure for 2020 from 281,441,428 KZT to 281,441,000 KZT and for 2021 from 281,441,856 KZT.

PPP Contract in Supplementary Agreement No 2, which increased the CIC for 2021 to reflect the construction of the transformer substation.<sup>9</sup>

- 135 Although the court has power under Article 401(2) of the Civil Code to amend a contract at the request of one of the parties to the contract, it does so only where there is “*a material violation of the agreement by the other party*” or where stipulated by other legislative acts or an agreement. In this case, I have found that the Public Partner is in breach of the PPP Contract. There is no agreement in the Supplementary Agreements or elsewhere to postpone the dates for the reimbursement of the CIC to 2024 and 2025. The Public Partner has not pointed to any other legislation authorising the court to amend the PPP Contract in these circumstances. To amend it by postponing the dates on which payments of CIC are to be made at the request of a contract breaker whose breach precluded the innocent party from performing by the contractual specified date is very unattractive. It would be to impose the consequences of the breach on the innocent party who has suffered loss and would relieve the contract breaker of at least some of the consequences of its own breach.
- 136 Against the background of the provisions of the Civil Code set out at [117] to [119], and the terms of clauses 8 and 104(11) and (12) I have concluded that the Public Partner was obliged to provide the engineering infrastructure to the connection points and bears the risk of the change of plans caused by the fact that the original plan for the construction of the transformer substation on a neighbouring site by another Private Partner constructing another kindergarten did not come to fruition. I have also concluded that the Public Partner was in breach of its obligation. I consider whether the breach amounted to a guilty failure by the Public Partner to fulfil its obligation at [161] ff. I also consider whether, if it did, the consequence is that under the legislation of the Republic of Kazakhstan and the terms of the PPP Contract the Public Partner is liable to reimburse the Private Partner for the additional costs incurred by it which were caused by the breach.

**(iv) Reports and documents required by clause 100 and Appendix 5:**

- 137 The Public Partner submitted that the Private Partner provided no reports on the fulfilment of obligations under the contract and the status of construction: Closing, §11 page 10. Two of its witnesses stated that they had not seen any of the reports and documents required by clause 100: see Ms Aitzhanova, §§ 4-5 and Ms Kasymbekova, §§ 28-29. Ms Kasymbekova was the head of the City’s Department of Economics and Budget Planning and said she only saw the documents passed to her department by the Education Department. I referred at [108] to Ms Aitzhanova’s statement that she had not requested the documents or complained about the Private Partner not providing them because that was the responsibility of the Private

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<sup>9</sup> Clause 2 changed the schedule in Appendix 6 for 2021 to 627,967,856 KZT (adding the 346,526,000 KZT in respect of the transformer substation) and added the same amount to the total increasing it from 1,688,648,570 KZT to 2,035,174,570 KZT.

Partner. In cross-examination, it was put to her that she was claiming that the Private Partner prepared monthly construction reports which were later provided for forensic examination, but that it had never provided them to the Public Partner. She replied that the Public Partner had not received any documents from the Private Partner, including these progress reports and asked to which specialist they were submitted.

- 138 The Private Partner did not file direct documentary evidence showing that such reports had been submitted to the Public Partner. It relied on Acts of Completed Works signed by the Private Partner and the contractor for the months between May 2018 and October 2020<sup>10</sup> which it had submitted to the State Centre for Forensic Examinations of the Ministry of Justice of the Republic of Kazakhstan on 2 April 2021 for the determination *inter alia* the actual CIC incurred by the Private Partner. The Acts of Completed Works are referred to in the Centre's expert opinion No 63p dated 6 May 2021. There was no suggestion that the Acts of Completed Works referred to in opinion No. 63p are not genuine, and it appears that, after the kindergarten was commissioned, they did lead to a number of payments to the Private Partner.
- 139 Given the existence of the Acts of Completed Works prepared for the specified months, in many cases more than one Act for a given month, it is difficult to understand why the Private Partner would not have provided them to the Public Partner. But Ms Nurkeyeva did not suggest that it would be appropriate for the court to infer from the provision to the State Centre for Forensic Examinations in 2021 of the Acts between 2018 to 2020 that they had been provided to the Public Partner on a quarterly basis between 2018 and 2020. She was correct not to do so. The Private Partner did not provide evidence, such as a receipt or the name of the official to whom the reports were provided. Nor did it explain the absence of documentary evidence.
- 140 It is, however, not necessary to infer that the reports were in fact provided because I have concluded that their provision is not a requirement for the Private Partner to be reimbursed for the contractually specified CIC and additional costs associated with the Public Partner's failure to provide the electricity connection point. I agree with Dr Nesterova (JM, section 5) that *"the procedure and fulfilment by the [Private Partner] of its obligations to provide quarterly reports did not affect its rights to claim compensation for additional costs associated with the [Public] Partner's failure to fulfil the obligation to bring engineering infrastructure to the land provided for construction"*.
- 141 As to the position if, as the Public Partner maintained, no reports were provided, the Public Partner did not suggest that it has suffered loss within the meaning of Article 9(4) of the Civil Code from failure to provide the reports. It relied on Article 295 which is chapter 18 of the Code which is concerned with securing the execution of obligations and not chapter 20 which deals with liability for violation of an obligation.

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<sup>10</sup> In the case of many months there were several Acts of completed Works.

It claimed a penalty under Article 295 and clause 80 of the contract, submitting that the penalty should be *“a percentage of non-performed or improperly performed obligation, in this case, the [CIC]”*: Response, §§ 37-39.

- 142 Article 293 is in paragraph 2 of chapter 18, entitled “Forfeit”. The definition of “forfeit” is in Article 292 which provides:

*“Damages (fine, penalty) shall be recognized as a monetary amount defined by legislation or agreement, which must be paid by a debtor to the creditor in the case of failure to execute, or improper execution of an obligation, in particular, in the case of a delay in execution. **Upon the claim to pay the damages, the creditor shall not be obliged to prove losses caused to him.**”* (emphasis added)

- 143 Article 295(1) provides:

*“A creditor shall have the right to claim the payment of damages as determined by legislation (legal damages), irrespective of whether the obligation for its payment is stipulated in the agreement of the parties.”*

- 144 Article 296 provides the amount of a forfeit is to be a fixed monetary amount; a percentage of the amount in default, or the amount of the improperly executed obligation. But the obligation under clause 100 is to provide reports rather than to pay money and neither clause 100 nor the remainder of the PPP Contract specify a defined lump sum or a process for determining the amount of penalty in the way envisaged by clause 80 and is done by clauses 16 and 81 of the contract. Article 295(1) of the Civil Code shows that the fact that the contract does not provide for the payment of a forfeit does not preclude the award of one by the court. But it does mean that the task of determining what monetary sum would be appropriate and not an excessive penalty is not straightforward, particularly where, as in this case, the Public Partner claiming the penalty has not suggested a figure or principles which could be used to determine a figure.

- 145 Article 297, which gives the court the power to reduce the amount of *“the penalty (fine, fee)”* *“if it is excessively large compared to the losses of the creditor”*, where the debtor requests it, is not applicable because there has been no request. But the discussion of Article 297 in this court by Justice Sir Rupert Jackson in Case No: AIFC-C/CFI/2022/0020 *Freedom Finance JSC v Egor Romanyuk* (1 February 2023) at [5.12] – [5.16] and [6.10] – [6.13] is of some assistance. In that case the contract provided for a defined lump sum, but what was said about how to approach the determination of what penalty to award is useful even where the contract does not do so. Mr. Sergei Vataev, who attended the trial in that case as *amicus curiae* and assisted the Court in the capacity of an independent advocate, stated that Kazakhstan courts exercise their discretion as to whether a penalty is excessively large *“based on common sense and rational considerations”*. He concluded that *“the courts often exercise a*

*‘sympathetic’ attitude and reduce the penalty, especially if its size is not commensurate to the actual damages”* suffered by the person claiming it.

146 In this case the Public Partner has not alleged that the failure to provide the reports caused it loss. It did not request in writing as envisaged by clause 101 of the contract (referred to at [86]) that the Private Partner’s breaches of clause 100 be eliminated within 30 days or a period agreed by the parties. The fact that the procedure in clause 101 was not used suggests that the Public Partner did not consider the failure to provide the Reports, in the words of that provision *“may significantly affect the Private Partner’s compliance with the terms of the contract”*. Moreover, in the light of Ms Aitzhanova’s evidence, it appears that, at no stage during the construction period or before the commencement of these proceedings did the Public Partner complain to the Private Partner about its failure to provide the reports. After the construction was completed, the Public Partner signed a Commissioning Certificate accepting the facility into operation. No complaint has been made about the quality of the work.

147 I also take into account the fact that, as was common ground, the PPP Contract was one to be performed in particular in accordance with the Law on Public-Private Partnership. Article 1(6) of that law provides that such a partnership is a form of co-operation between the partners. Article 3(1)(1) provides that one of the main objectives of such a partnership is the creation of conditions for effective interaction between the partners and Article 3(2) that its principles include the principles *“of consistency – a step by step construction of the relationship ...”* and *“of balance - mutually beneficial distribution of responsibilities”* between the partners. In my judgment, the failure to follow the procedure in clause 101 or to complain about the reports to the Private Partner but then to claim a penalty is not consistent with the principle of good faith in Article 8(2) of the Civil Code. that, when exercising their rights *“citizens and legal entities must act in good faith, reasonably and fairly”*.

148 I have borne in mind the need for the penalty or forfeit to be of an amount, in Mr. Vataev’s words *“commensurate to the actual damages”*, that in this case the failure to provide the reports caused no loss, and the other factors I set out above. I have concluded that in this case the appropriate penalty is 2,500,000 KZT.

***(vi) Transfer of the PPP facility to communal ownership***

149 Clause 86 of the contract provides that *“the created and commissioned PPP facility shall be subject to transfer to municipal ownership”* but although the facility has been commissioned, to date the transfer has not occurred. It appears that the documentation and procedure for transfer has not been completed because of a dispute as to the amounts of CIC due and what amount should be entered in the Transfer and Acceptance Certificate. The Public Partner maintains that it should be the CIC specified in the contract as amended. The Private Partner maintains that, as a result of the Public Partner’s breach of contract in relation to the electricity



infrastructure, it should be the actual CIC it incurred. Agreements made in March and August 2021 that the Transfer and Acceptance Certificate should contain both sums, probably with the aim of not prejudicing their legal positions, have not resolved the matter.

- 150 The history of what occurred is summarised below, partly from letters before the court and partly from the agreed minutes of negotiations between the parties on 19 August 2021. Before doing so, I summarise the procedure for such transfers. It is contained in an Order of the Minister of National Economy of the Republic of Kazakhstan dated 25 November 2015, *“On Approval of the Rules for the Admission of Public Private Partnership Objects (Facilities) into State Ownership Rule No. 713.*
- 151 Rule 713 requires the Private Partner to apply for the acceptance of a facility into communal ownership within 30 working days of it being commissioned: §9. In the present case the kindergarten and transformer substation were commissioned on 7 and 8 October 2020. State registration of the commissioning of the kindergarten occurred on 20 October 2020. State registration of the transformer substation was only completed on 2 July 2021 because of an error when registration was first attempted. §12 of Rule No. 713 requires the Public Partner to make a decision on the application within 10 days.
- 152 I turn to the history. In a letter dated 6 November 2020, within the 30-day period specified in §9 of Rule No. 713, the Private Partner requested the Akim of Astana to accept the facility into communal ownership. The letter stated that copies of the contract, the Facility Commissioning Certificates and the confirmation of state registration by the judicial authorities were annexed. It also stated that a document confirming the book value of the facility and a report on its technical condition would be provided.
- 153 The minutes of the negotiations on 19 August 2021 record that the Transfer and Acceptance Certificate was prepared in November 2020 and the Private Partner subsequently stated that it had sent it to the Public Partner but without a covering letter that month on or about 18 November. On 15 December 2020 the Private Partner sent the Public Partner two copies of the Transfer and Acceptance Certificate which it had signed in a letter, ref. no. 1-21/403. The letter stated that with the sending of the Transfer and Acceptance Certificate it had fulfilled its obligations and asked the Public Partner to pay the CIC. The summary of the position of the Public Partner in the minutes of the negotiations on 19 August 2021 records that the Transfer and Acceptance Certificate provided in December 2020 indicated only 2,180,806,298 KZT, the sum claimed by the Private Partner as its actual CIC, and not the 1,688,648,570 KZT specified in the contract for the kindergarten building.
- 154 On 3 February 2021, the Akimat of Astana resolved to accept the kindergarten into the communal ownership of the City and to require the Department of Assets and Public Procurement to ensure the transfer of the property to the Department of Education, the Public Partner. The was more than 2 months after the expiry of the

30-day deadline specified in §12 of Rule No. 713. The Private Partner submitted that resolution showed that the Akim considered that it had completed its part of the transfer process and had fulfilled its obligation to transfer the kindergarten to communal ownership.

- 155 What the minutes of the negotiations on 19 August 2021 record in the summary by the Public Partner of its position is also material. The Public Partner's position was that at a meeting in March 2021 the parties had agreed to indicate two amounts of CIC in the Transfer and Acceptance Certificate, the 1,688,648,570 KZT specified in the contract as amended and the 2,180,806,298 KZT claimed by the Private Partner as its actual CIC.
- 156 It appears that in a letter dated 14 May 2021 (not before the court), the Public Partner stated that the Private Partner had not yet signed the Act of Acceptance and Transfer. The Private Partner's response in a letter dated 3 June 2021 (ref. no 1-21/49) was that that was not true. It stated that it had sent the Act of Acceptance and Transfer *"at least five times"*, listing November 2020, the letter dated 15 December, and letters dated 15 January 2021 (ref. no. 1-21/03), 19 February 2021 (ref. no. 1-21/6), and 5 May 2021 (ref. no. 1-21/38). The letter dated 3 June stated that *"once again, we send you the act of acceptance and transfer signed by us with the actual book value for further registration by the authorised body of the ownership and transfer of the PPP object to us for possession and use in accordance with the times of the PPP Contract."*
- 157 The summary of the Public Partner's position at the negotiations on 19 August 2021 states that the Private Partner had not yet signed the Transfer and Acceptance Certificate and as at that date had only sent certificates indicating the CIC claimed by the Private Partner. The summary of the Private Partner's position at the August negotiations stated the basis upon which it claimed to be entitled to its actual CIC; that is the destabilising events caused by the Public Partner.
- 158 At the negotiations on 19 August 2021, two decisions were made about the Transfer and Acceptance Certificate. The first, in effect reiterating what the Public Partner accepted had been agreed in March, was that each party should prescribe the amount of CIC it considered was due. The Private Partner should prescribe the 2,180,806,298 KZT it claimed as its actual CIC. The Public Partner should prescribe the 1,688,648,570 KZT specified in the contract as amended. The second decision was that in the Certificate the Private Partner should indicate the date of 18 November 2020 and the Public Partner should indicate the date of the meeting; 19 August 2021.
- 159 I accept Ms Nurkeyeva's submission that the facts I have set out show that the Private Partner attempted to transfer the kindergarten and transformer substation to communal ownership from November 2020. It did so in a way consistent with its claim to be entitled to its actual CIC as a result of the breaches of contract by the Public Partner. Although the Public Partner accepted that in March 2021 it had



agreed that the Transfer and Acceptance Certificate should indicate two amounts of CIC, reflecting the parties' positions, and although it had received signed copies of the Certificate signed by the Private Partner it continued not to sign the Certificate. It has maintained its position despite the agreements in March and August 2021 that the Transfer and Acceptance Certificate should reflect both parties' positions on CIC.

160 I also accept Ms Nurkeyeva's submission that, since the dispute about the amount of CIC that is payable is before me, my decision on that will resolve the somewhat formal question of the terms upon which the Certificate should be signed. I deal with the amount of CIC to which Private Partner is entitled at [171] – [182] below.

**(vii) The extent of the Public Partner's liability for its failure to fulfil its obligation to connect the plot to the connection point of the electricity network:**

**a) Compensation for losses caused by the violation and 'guilt' within clause 115 and the Civil Code:**

161 Clauses 110, 114 and 115 of the PPP Contract<sup>11</sup> and Articles 350, 359 and 366 of the Civil Code provide that the Public Partner is liable for losses caused to the Private Partner by its failure to fulfil its obligation to provide that the land plot has the engineering infrastructure to the connection points connected to it if, in the words used in Clause 115, the losses "*arose solely through the fault of the Public Partner and such guilt is proved in court*".

162 Article 350 of the Civil Code provides that "*a debtor who violated an obligation shall be obliged to compensate the creditor for any losses caused by the violation*". with losses and damages as defined by Article 9(4). It provides:

*"the concept of damages means the losses, which are in curd all must be encouraged by the person whose right is violated, the loss or damage of his property (real damage) and also lost profit which this person would have received under the normal conditions of the turnover, should his right have not been violated (lost profits)".*

163 Article 359(1) provides:

*"A debtor shall be responsible for failure to execute and (or) improper execution of an obligation if guilt exists, unless it is otherwise stipulated in legislation or agreement. **A debtor shall be recognized as innocent, if he proves that he adopted all the remedies under his control for a proper execution of the obligation.**"* (emphasis added)

<sup>11</sup>

The clauses are set out or summarised at [44].

Article 366(2) of the Civil Code makes similar provision for delay in performing an obligation unless the party which has delayed *“proves that the delay took place due to circumstances for which neither he himself nor those persons who, by virtue of legislation or the creditor’s instructions, were entrusted with the acceptance of performance, are not responsible”*.

- 164 Articles 359 and 366 impose the burden on the person in breach of the obligation to show that *“guilt”* does not exist by proving that he or she has taken all steps in his or her power to perform the obligation although that is subject to contrary provision in an agreement. Article 359(1) provides that its provisions apply *“unless it is otherwise stipulated in legislation or agreement”*. Article 359(2) provides that *“legislation or the agreement may provide for other grounds for liability or release therefrom”*.
- 165 Mr Privalov’s view (see JM, section 8(i)) is that the PPP Contract in this case provides for a different burden of proof because by clause 115 of the PPP Contract guilt can be determined *“only by the court, if there is evidence of guilt”*. There is some force in this although clause 115 does not expressly address the burden of proof or expressly disapply the default provision in Article 359. In view of my findings at [105] – [114] it is not necessary to determine whether the language of clause 115 suffices to disapply the default rule in Article 359 and require that the innocent party, here the Private Partner, prove the guilt of the person who has not fulfilled his or her obligation.
- 166 This is because, on the evidence I have accepted and the findings I have made, the Private Partner has shown that the Public Partner did not take all steps in its power to perform its obligation and thus established *“guilt”* within Article 359 of the Civil Code. The Public Partner knew or should have known that the transformer substation envisaged as the connection point for this kindergarten had not been built. On the basis of the evidence of Messrs Meldeshov, Amanzholov, Satylganov and Kovalenko, I have found that, rather than doing anything to provide a connection point, the Public Partner effectively left it to the Private Partner to do so. It was essentially inactive. It did not respond positively when the Private Partner informed it of the problems. It did not assist the Private Partner in the performance of its work under the contract as it was obliged to by Article 629(1) of the Civil Code. It did not accept responsibility until after the Private Partner’s appeal to the PPP Competition Commission succeeded in October 2019, some 18 months after construction had started.
- 167 The customer’s obligation under Article 629(1) of the Civil Code to assist the contractor in the performance of work to the extent and in the manner prescribed by the contract is also relevant to the question of the extent of the liability of the customer, here the Public Partner. The second part of Article 629(1) provides that, *“in the event of the non-performance of this obligation, “the contractor has the right to demand compensation for damages including the extra costs, caused by the downtime or deferral of execution of work or increase in the price of work”*.

168 For these reasons, I have found that the “guilt” of the Public Partner has been established. Accordingly, Article 9(4) of the Civil Code entitles the Private Partner to *“the entire restitution of the damages inflicted on him (her)”*.

**b) Restoring the financial balance after a “disruption event”:**

169 Clause 107 of the contract provides that the parties *“have the right to restore the financial balance in accordance with the financial and economic model, if there is violation of the balance as a result of ... a disruption event”*. By clauses 105(1) and (8) *“disruption event”* includes *“failure of the public partner to fulfil [its] own obligations under the contract”* and *“violation of deadlines and increase in costs by 5 (five) % or more during the construction of the PPP facility, which occurred not due to the fault of the Private Partner”*.

170 The procedure specified in clause 109 for reviewing the CIC and other payments was not operated but the Private Partner relied on the right in clause 107 to restore the initial financial balance and on the calculations in the financial and economic model in Appendix 7 to the contract. Supported by §§ 37-41 of Dr Nesterova’s Report, it submitted that clause 107 showed that the intention of the agreement was to compensate it fully for the investments made, and that, after the occurrence of a disruption event, they entitled it to recover the actual CIC rather than the amounts specified in the contract itself. I accept this submission.

**c) Recovery of the actual investment costs:**

171 The Public Partner’s case that the Private Partner is only entitled to the CIC specified in the contract and not to the actual CIC assumes either that it was not in breach of contract or, if it was, that its “guilt” was not established. Alternatively, it overlooks the provisions of the Civil Code discussed above, in particular Articles 350 and 9(4), and clauses 107 and 115 of the contract. The Private Partner’s claim as to the amount of its actual investment costs were examined by the Institute of Forensic Examinations, a branch of the State Centre for Forensic Examinations of the Ministry of Justice of the Republic of Kazakhstan. Ms Zhusupova, a specialist and the Institute’s Chief Expert, conducted the examination and prepared a report, expert opinion No 89p, dated 22 April 2021. The examination and report were based on the documents submitted by Buldirshin-2012.

172 Ms Zhusupova examined whether: (a) the work on the kindergarten specified in the design and estimate documentation and completion certificates and its cost corresponded to the completion certificates; (b) the actual work on the kindergarten and its cost corresponded to the completion certificates, (c) the volume and cost of any actual works not taken into account in the calculations for excluded and added works, and (d) the specified prices in the design and estimate

documentation corresponded to the period of actual work in 2018 to 2020. In each case the Institute was to determine the extent of any discrepancy.

- 173 On the book value, the Report stated that the costs incurred during the construction of the facility were:

<b>Construction of:</b>	<b>Cost (tenge)</b>
Kindergarten	2,175,895,543
TP and cable line	338,314,530
<b>Total book value</b>	<b>2,514,210,073*</b>

\*This is the value of the book value of the facility indicated in the Certificate dated 20 October 2020.

- 174 On the correctness of the CIC stated in the contract for the kindergarten (1,688,648,570 KZT) and in Supplementary Agreement No. 1 for the transformer substation and cable line (346, 526,000 KZT), the Report stated that the actual investment costs were:

<b>Construction of:</b>	<b>CMP</b>	<b>Adm. Expenses</b>	<b>Financing costs</b>	<b>Total thous. Tenge</b>
Kindergarten	1,869,724,69	22,900,89	284,694,8	2,177,320.37
TP and cable line	338,314,53	0	0	338,314.53
<b>Total</b>	<b>2,208,039,22</b>	<b>22,900,89</b>	<b>284,694,8</b>	<b>2,515,634,9*</b>

\*This is the value of the Private Partner's investment costs for the project indicated in the Certificate dated 17 November 2020.

- 175 In her oral evidence Ms Zhusupova stated that the truthfulness of the documents was the responsibility of the applicant, here Buldirshin-2012. It had submitted the primary accounting documents which she had described in the opinion. They were all compliant with accounting standards and were properly signed and stamped. The documents sufficed for a full forensic examination, and she had taken them all into account. While Ms Zhusupova was giving evidence, Mr Elamanov stated that in the Republic of Kazakhstan the value of construction facilities is defined by the conclusions or opinions of state experts and not private institutions and suggested that the views of the PPP authorities as to project costs prevailed over those of specialists such as Ms Zhusupova. However, in cross-examination he did not directly challenge the truthfulness of the documents or the figures themselves.
- 176 Mr Elamanov's submissions appeared to reflect a lack of understanding about the role of the Institute of Forensic Examinations and Ms Zhusupova in seeking to treat them as though they were private entities. The Institute is a public body, a branch of the State Centre for Forensic Examinations, which operates under the auspices of the Ministry of Justice. The examination was carried out by its Chief Expert. There was no suggestion that the examination was not carried out in accordance with the

Law *On Forensic Science Activity* dated 10 February 2017. The principles of forensic science activity under Article 5 of that Law include the independence of the forensic expert, his or her being comprehensive and objective, and complying with his or her professional ethical requirements.

- 177 Mr Elamanov's submissions, moreover, did not take account of the fact that the CIC figures in the contract were based on a construction period of 18 months starting in August 2017, not one lasting 30 months starting in March 2018 where the initial stages had to be performed in sub-optimal way using diesel generators. It was the additional work resulting from the Public Partner's failure to perform its obligations in relation to the electricity infrastructure and its delay in recognising that it was necessary to construct a transformer substation that meant that the actual CIC was greater than the CIC specified in the contract. There is in fact no inconsistency between the figures of actual investment costs submitted by the Public Partner for a project that took 30 months and the figures projected when contemplating a future project that would take 18 months.
- 178 For these reasons, leaving aside the issue of real damage and the actual investment costs in respect of the transformer substation and cable line discussed in the following paragraphs, I have concluded that the Private Partner has established that the figures confirmed by the forensic examination as the actual CIC are correct. Subject one caveat, I have concluded that the Public Partner is obliged to reimburse the Private Partner the difference between the total of 2,515,634,896 KZT actual CIC costs certified in expert opinion No 89p and the CIC provided for in the PPP Contract and the Supplementary Agreements. The caveat arises because the certified total of 2,515,634,896 KZT includes CMP of 338,314,530 in respect of the transformer substation and cable line but, as I have stated, the Public Partner has applied to withdraw its claims for real damage and actual CIC in respect of the transformer substation and cable line while reserving the right to bring fresh proceedings for them.
- 179 The Public Partner first sought to withdraw these claims in its Opening Submissions filed on 26 July 2022. Its reasons for seeking to do so were that the CIC for the transformer substation and the actual damage caused had not been subjected to forensic examinations, and documents, including the certificate of acceptance and contracts with individuals and banks for the provision of credit, had not been filed. The Public Partner did not comment or make submissions about this application either before or at the trial.
- 180 The information before the court leaves several questions unanswered. The first is that, as seen from the figures set out in [173] – [174], expert opinion No 89p does contain figures for the book value and the CMP of the transformer substation and cable line. The table set out in [174] gives a total of 2,515,634,896 KZT for actual investment costs which includes 338,314,530 KZT in respect of the transformer substation and cable line, which I understand reflects only the actual construction costs, and is the same figure as the book value in the table set out in [173]. But,

unless any fresh proceedings are only for administrative expenses and financing costs, it is possible that a fresh claim for the actual CIC in respect of the transformer substation and cable line might risk double recovery.

- 181 Secondly, expert opinion No. 89p was issued on 22 April 2021, over a year before the Private Partner's Opening Submissions. The Private Partner has not stated how long before filing its Opening Submissions it discovered that it had not submitted all the documents concerning the actual CIC for the transformer substation and cable line for forensic examination. It has also not given the reason for its failure to do so, which may well have been administrative error. Thirdly, the Private Partner has not said that it was not possible for a forensic examination of the documents concerning the transformer substation and cable line to have been undertaken between the date it discovered the problem (at its latest 26 July 2022) and the trial in November.
- 182 The unanswered questions left by these omissions do not sit comfortably with the overriding objective in Rule 1.6 of the AIFC Court Rules and may be relevant to the issue of costs should this matter come before the court again. Notwithstanding them, I have concluded that the Private Partner's application to withdraw these claims should be granted and it should be able to bring fresh proceedings for them provided that the following conditions are met:
- (a) A properly particularised claim supported by an expert opinion based on a forensic examination and the relative relevant documents is filed within two months of the handing down of this judgment.
  - (b) The claim should not duplicate the figures for actual investment costs for the transformer substation and cable line that are included in the calculation in expert opinion 89p and should provide an explanation of why there is no duplication.
  - (c) The Private Partner should inform the court when it discovered that it had failed to submit all the documents needed for determining the actual CIC for the transformer substation and cable line and why it did not apply for a forensic examination between the date of that discovery and the trial.

**d) *Penalty for improper use of other peoples' money:***

- 183 The Private Partner is also entitled to what Article 353 of the Civil Code describes as "*a penalty*" for "*improper use of other peoples' money as a result of failure to fulfil a monetary obligation or delay in their payment, or their unreasonable receipt or savings at the expense of another person*". The "penalty" is interest calculated on the base rate of the National Bank of the Republic of Kazakhstan from the date on which the monetary obligation became due until either the date the claim was filed, the date of the decision or the date of the actual payment "*at the choice of*

*the creditor*”: see Article 353(1). In this case the Private Partner has chosen to claim the penalty from 18 November 2020, the date of state registration of the Act of Commissioning of the kindergarten until 3 August 2022, about six months after 15 February 2022 when the claim was filed and about seven months before the date of this decision. It would have been entitled to claim the penalty until the date of this decision but has thus not chosen to do so. It is entitled to recover the 100,478,446 KZT claimed under Article 353.

**e) Loss of Profit:**

- 184 By Article 9(4) of the Civil Code (set out at [162]), the compensation for losses caused by the violation of an obligation under Article 350 include lost profits. Accordingly, as I have found that the Public Partner was at fault and “guilty” of breaches of clause 115 of the contract (see [161]) it is liable for such of the Private Partner’s loss of profits that were caused by those breaches.
- 185 The Private Partner submitted that the loss of profit is to be calculated on the basis of the estimates of net profit in the FEM of the kindergarten.<sup>12</sup> Those were 177,867,000 KZT for 2018, 198,652,000 KZT for 2019, and 234,909,000 KZT for 2020. It therefore claimed a total of 611,428,598 KZT as lost profit for the period from 2018 to 2020.
- 186 The Private Partner supported its submission by comparing the FEM’s estimate with the figures for actual net profit for 2021 and the first half of 2022. Those figures are in Statements of Comprehensive Income for that period which exclude income that is not related to the kindergarten and CIC payable under the contract. They are respectively 158,600,000 KZT for 2021, that is 11% less than the FEM’s estimate, and 107,153,000 KZT for the first half of 2022, that is 4% more than the FEM’s estimate.<sup>13</sup> On the basis of the differences in the figures for actual net profit in that 18 month period from the FEM’s estimate and the fact that in 2021 the actual profit was 11% less than the FEM’s estimate, while the actual figures are relevant, the material before me does not enable me to conclude that the figures for the second half of 2022 would make up for the 11% deficit in 2021. Accordingly, in my judgment, giving some weight to the figures for actual net profit, the compensation for losses of profit should be 10% less than the FEM’s estimate. I therefore award the Private partner 584,853,298 KZT in respect of losses of profit between 2018 and 2020.

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<sup>12</sup> C’s Opening §§48-50; C’s Closing §§ 96 and 99(5); § 9 of the Table in the list of factual and legal issues submitted pursuant to §9 of Directions Order No 2.

<sup>13</sup> C’s Opening §§51-53; C’s Closing §§ 96 and 99(5). The figures estimated for 2018 - 2020 are taken from the section on net profitability in the FEM’s “*Forecast Report on income and Expenses (Income Statement)*”. The figures which are stated to be actual net profit for 2021 and the first half of 2022 are taken from Buldirshin-2012 LLP’s Statements of Comprehensive Income for those periods.



**f) The Private Partner's legal costs:**

- 187 On 7 June 2021 the Private Partner contracted with S. Spector LLP for the provision of legal services in these proceedings at a fixed price of 50,000,000 KZT. It claims this sum from the Public Partner.
- 188 This court has power to make orders that one party pay the costs of another: AIFC Court Regulations 2017, reg. 27(4)(j) and AIFC Court Rules 2018, Part 26. Part 26.4 of the AIFC Court Rules provides that the court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are paid. Part 26.5 provides that if the Court decides to make an order as to costs the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. As to the basis of assessment, Part 26.11 provides that the court will allow costs which were *“reasonably and necessarily incurred and ... proportionate to the matters in issue”*.
- 189 The Public Partner's Closing, §7 of the Prayer on page 16, resists this. It, however, gives no reason why the general rule should not apply and has not argued that the costs claimed by the Private Partner were not reasonably and necessarily incurred and proportionate to the matters in issue.
- 190 In deciding whether the general rule should apply and, if so, whether the costs claimed by the Private Partner are reasonable and proportionate to the matters in issue, I have considered the number of issues which had to be addressed and decided, and their complexity. Section J of the judgment shows that there were many disputed issues of fact and law. This was a complex construction dispute, with additional complexity because the contract was a long-term public-private investment agreement which had to be concluded and performed in accordance with the Law on Public-Private Partnership. The total sum claimed is 1,805,250,226 KZT, which is in the region of US\$4 million. I have concluded that a fixed price of 50,000,000 KZT for legal services in a claim of this size and complexity is reasonable and proportionate to the matters in issue and that the Private Partner is entitled to recover that sum.

**K Conclusions and Disposition**

- 191 My conclusions on the main issues and the reasons for them set out in section J of this judgment mean that the Private Partner has substantially succeeded in its claims. Before summarising those conclusions and the orders of the court in the remainder of this section, I refer to my two interlocutory rulings.
- 192 The first is my ruling at the CMC on 18 October 2022 that the issue of placement and proportion under the state order raised in the Public Partner's Response to the claim should not be heard together with the claim. I summarised the basis of the Private Partner's application and my reasons for accepting it at [56] - [61]. That



ruling did not preclude the Public Partner filing a claim against the Private Partner regarding the placement of children under a state order. It has not yet done so but must do so if it wishes to pursue this matter.

193 The second matter is the Private Partner's application to withdraw its claims for real damage and actual CIC in respect of the transformer substation and cable line while reserving the right to bring fresh proceedings for them. I accepted this application in the judgment at [182]. But I did so on the condition that a properly particularised claim supported by an expert opinion based on a forensic examination and the relative relevant documents is filed within two months of the handing down of this judgment. There are two other conditions also set out at [182].

194 My conclusions and the orders of the court are:

- (1) The Public Partner was in breach of its obligations to provide the plot within the period specified in the contract and to provide a plot connected to the connection point of the electricity network: see [66], [77], [91], [114] and [136].
- (2) The dates for the reimbursement of the CIC for 2018 and for 2019 are not to be postponed to 2024 and 2025: see [135]. Accordingly, the Private Partner is entitled to recover 281,441,428 KZT for 2018 and the same sum for 2019, a total of 562,882,860 KZT which the Court orders the Public Partner to pay. The Public Partner remains liable to pay the sum payable as CIC in 2023 under the payment schedule in the PPP Contract.
- (3) The Private Partner is entitled to a payment of 100,478,446 KZT under Article 353 of the Civil Code for the unlawful use of the 562,882,860 KZT due as CIC in 2018 and 2019 and the Court so orders: see [183].
- (4) The Private Partner is entitled to recover compensation for the difference between the CIC provided for in the contract, 2,035,174,570 KZT, and its actual investment costs: see [168] – [170]. In the light of expert opinion 89p I have found (at [178]) that its actual CIC amounted to a total of 2,515,634,896 KZT as of 17 November 2020, which total included CMP of 338,314,530 in respect of the transformer substation and cable line. The Private Partner is therefore entitled to the difference of 480,460,326 KZT as compensation which the Court orders the Public Partner to pay.
- (5) The Private Partner is entitled to recover from the Public Partner its losses of profit between 2018 and 2020. For the reasons given at [184] – [185] the loss of profit has been assessed as 584,853,298 KZT, which the Court orders the Public Partner to pay.
- (6) For the reasons given at [188] - [189] the Private Partner is entitled to recover from the Public Partner its legal costs of 50,000,000 KZT which is a reasonable

and proportionate sum for a claim of this size and complexity, and which the Court orders the Public Partner to pay.

- (7) Against the evidential position summarised at [138] - [139], I concluded at [144] - [148] that the Public Partner is entitled to recover from the Private Partner a forfeit or penalty of 2,500,000 KZT under Article 295 of the Civil Code for failure between 2018 and 2020 to submit the reports required by clause 100 and Appendix 5 of the contract to the Public Partner. It was not appropriate to infer that it had done so from the Acts of Completed Works signed by the Private Partner and the contractor for the months between May 2018 and October 2020 which it submitted for forensic examination on 2 April 2021. The Court orders that the sum of 2,500,000 KZT be deducted from the total sum which the Court has ordered the Public Partner to pay.

- 195 The sums payable under the various heads of liability are set out in the Table below:

Head of Recovery	Amount (KZT)
Debt for CIC due in 2018	281,441,428
Debt for CIC due in 2019	281,441,428
Penalty under Civil Code, Article 353 for the unlawful use of the debts for CIC due for the period from 18 November 2020 to 3 August 2022	100,478,446
Compensation for the difference between the CIC actually incurred and the CIC provided for in the PPP Contract and the Supplementary Agreements	480,460,326
Loss of profit for the period from 2018 to 2020	584,853,298
The Private Partner's legal costs	50,000,000
The forfeit the Private Partner is Ordered to pay under Article 295 of the Civil Code	minus 2,500,000
<b>TOTAL SUM THE PUBLIC PARTNER IS ORDERED TO PAY AFTER DEDUCTING THE 2,500,000 KZT FORFEIT UNDER ARTICLE 295</b>	<b>1,776,174,926</b>

- 196 The Court orders the Public Partner to pay the Private Partner the sum of **1,776,174,926 KZT** within 28 days of the handing down of this judgment.

By Order of the Court,

The Rt. Hon. Sir Jack Beatson FBA,  
Justice, AIFC Court



**Representation:**

The Claimant, Buldirshin-2012 LLP, was represented by Ms. Gulnur Nurkeyeva, a Partner of Grata LLP Law Firm.

The Defendant, The State Institution “Astana Education Department”, was represented by Mr. Elamanov Nariman, Deputy Head of the Education Department.

**APPENDIX TO THE JUDGMENT****SUMMARY OF THE POSITION OF THE EXPERTS ON KAZAKH LAW ON THE ISSUES****BEFORE THE COURT**

- 1 Both Dr Nesterova and Mr Privalov commented on the content and general application of the relevant Kazakhstan legislation to the legal issues under the PPP contract and the application of such law to the facts of this case. They prepared reports and a Joint Memorandum (hereafter “JM”) which identifies and summarises the matters on which they agreed and those on which they were unable to agree. The extent of the differences between them is evident from the summary of their positions on the issues before the court in these proceedings in the paragraphs that follow.<sup>14</sup> Accordingly, the summary does not include their opinions on the issue of placement and proportion of children under the state order and whether, in relation to that, the court’s power under Article 401(2) of the Civil Code to order that the terms of the PPP contract on the state order issue be amended which are summarised in JM sections 18 and 19.

*Legal Nature of the PPP contract, JM, section 1*

- 2 It was agreed by the experts that the PPP contract in this case falls within the category of civil law investment long term Public Private Partnership agreements subject to Law No. 379 V LRK dated 31 October 2015 and the Civil and Entrepreneurial Codes of Kazakhstan: see JM, section 1.

*Rules for Interpreting a Contract under Kazakh law, JM section 17*

- 3 JM section 17 states that it was also agreed by Dr Nesterova and Mr Privalov that the rules for interpreting a Treaty or contract under Kazakh law are:

*“ ... priority in interpretation he's given to the literal content of the words and expressions contained in the [contract].<sup>15</sup>*

*In cases of ambiguity of the direct meaning of the literal content of words and expressions, it is established by comparison with other conditions and the meaning of the contract as a whole.*

*Only when a literal interpretation is not possible does the court resort to ascertaining the actual common will of the parties, taking into*

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<sup>14</sup> References to Dr Nesterova’s Report are to paragraph numbers. Mr Privalov’s Report was unpaginated and contains no paragraph numbers. References to it are to the sequential page number and the page in Bundle No. 4 of the documents before the court (B4/ xx, xx).

<sup>15</sup> The English translation of JM, section 17 uses the words “Treaty”, “contract” and “Agreement”. “Treaty” appears to be used to refer to a “contract”, and in this extract the word “[contract]” in square brackets is used instead of Treaty”.

*account the purpose of the [contract]. To do this the court takes into account all the accompanying circumstances, including negotiations and correspondence preceding the contract, the practise established in the mutual relations of the parties, business customs, and the subsequent behaviour of the parties.*

*The interpretation of the Agreement is carried out by the court in the event that this is done in fulfilment of the requirements stated by the parties.”*

*An obligation to provide a plot of land with engineering infrastructure connected to it, whether there was breach and the presence or absence of claims for the provision of a plot of land: JM, sections 2, 3 and 7.*

- 4 The experts agreed that under clauses 7 and 8 of the contract the Public Partner was obliged to provide the Private Partner with a plot of land for the construction with the necessary engineering infrastructure. They did not, however, agree which party bore the risk of untimely provision of that engineering infrastructure or whether the Public Partner was in breach of its obligation to provide a plot of land with engineering infrastructure connected to it.
- 5 Dr Nesterova stated that the Public Partner was obliged to provide a plot with the infrastructure necessary for the construction work and subsequent operation of the kindergarten: Report, §18, JM, section 2. That was expressly provided for by the contract and imperative norms in Articles 651, 658 and 659 of the Kazakhstan Civil Code: Report, §§ 17 and 21-24; JM, section 2. As the Public Partner did not provide a plot with the necessary infrastructure it was in breach of that obligation, and, provided it did not prove that it had taken all measures in its power to fulfil its obligation to do so, would be liable under clause 115 of the contract: Report, §§25 and 33 and Article 359(1) of the Kazakhstan Civil Code and JM, section 3. She also stated that the risk of untimely provision of the engineering utilities was expressly assigned to the Public Partner by clause 104 (11) of the contract: Report, §§ 19 and 22, JM, section 2. The presence or absence of claims for the provision of a plot of land as well as the form and content of such claims do not affect the Private Partner’s right to demand compensation for all additional costs associated with the failure of the public Partner to fulfil the obligation to provide a plot of land with the electricity infrastructure connected to it: JM, Section 7(iv). I summarise Dr Nesterov’s view as to the consequences of a failure by the Public Partner to fulfil its contractual obligations below.
- 6 As to Mr Privalov’s view, JM section 2 records him as considering that “*the infrastructure includes many components*”, that “*in view of the specifics of construction, the point of connection of electricity has changed*”, and that “*it is provided exclusively by Astana REC JSC*”. The Joint Memorandum also states that the issue of connection was first raised by the Private Partner in June 2018 and, in relation to the start of construction in March 2018, records Mr Privalov’s view that the delay

was due to the fault of the Private Partner: JM, section 4, Mr Privalov's point (ii). Mr Privalov's view is that the Public Partner was not in breach of an obligation to provide a plot with the necessary infrastructure for two reasons. The first was that the plot was handed over to the Private Partner on time under the agreement and the Private Partner accepted the plot without any comments and made no claims concerning the provision of the land for about 10 months until June 2018: Report, pages 4 and 10 (B4 pp 89 and 95); Mr Privalov's point (ii) in JM section 3 and section 7. The second was that the Private Partner did not notify the Public Partner about the infrastructure including the electricity connection as it was required to by clauses 36 and 102 of the contract: Report, pages 3 and 9 (B4 pp 88 and 94) and Mr Privalov's points in JM section 3. There was thus no evidence of the guilt of the Public Partner before the court.

*The start of construction: JM, section 4*

- 7 The experts agree that there was a delay in starting construction and that it in fact started in March 2018: JM, section 4. Dr Nesterova stated that the reasons for the delay are a matter of fact and not one of law. Mr Privalov, however, stated that while they are "*more a matter of fact*" they are also "*a legal issue*". Dr Nesterova also stated that, whatever the reason for the delay in starting construction, the delay did not deprive the Private Partner of the right to compensation for additional costs associated with the failure of the Public Partner to bring the engineering infrastructure to the plot which was provided.

*The provision of quarterly reports: JM, section 5*

- 8 The experts did not agree. Dr Nesterova considered that the provision of quarterly reports by the Private Partner is a matter of fact, not a matter of law: JM, section 5(i). She also considered that the fulfilment by the Private Partner of its obligations to provide quarterly reports did not does not affect its rights to claim compensation for all additional costs associated with the Public Partner's failure to fulfil the obligation to bring engineering infrastructure to the land provided for construction of the kindergarten: Report, §66, JM, section 5(ii). Mr Privalov considered that the absence of any of these reports in the documentation filed by the Private Partner demonstrates the absence of factual confirmation of its arguments: Report, page 3-5, 9-10, 11, 12 **4/88-92, 95, 97**, JM, section 5

*The obligation in clause 36 to notify the Public Partner: JM, section 6*

- 9 The experts did not agree. Dr Nesterova considered that clause 36 of the contract does not apply the situation which arose because of the lack of engineering infrastructure: Report, §63, JM, section 6 (i)-(iii), (v). It imposes an obligation on the Private Partner to notify the Public Partner if it "*discovers circumstances beyond the control of the Parties that make it impossible to construct and commission the PPP facility within the time limit stipulated by the Contract*". Dr Nesterova stated that clause 36 is clear and subject to literal interpretation. The supply of engineering infrastructure to the plot of

land provided upon which the kindergarten was to be constructed was completely dependent on the Public Partner and included in the zone of its obligations, risks and responsibilities: Report, §65, JM, section 6(iii). She inferred from an undated letter from the Public Partner to the Private Partner after Buldirshin-2012's appeal regarding the PPP contract that the Public Partner knew about the lack of power grid infrastructure on the plot: Report, §25 and Appendix 9, JM, section 6 (iv). She considered that the official notification (or non-notification) of the lack of power grid infrastructure on the plot is *"legally indifferent and does not affect the Private Partner to compensate[ion] for its losses caused by the failure of the Public Partner to fulfil the obligation to supply engineering infrastructure"*: Report, §66. Dr Nesterova also considered that the issue of procedure, methods and content of communications between the parties after the contract was made is a matter of fact and not a legal issue: Report, §64, JM, section 6(vi).

- 10 Mr Privalov stated that, in addition to clause 36 concerning circumstances beyond the control of the parties, clause 102 of the contract required the Parties to provide each other with timely information necessary for the performance of their obligations under the contract and immediately to notify each other of the occurrence of significant events that may affect the proper performance of those obligations: Report, page 3 (B4/88) and JM, section 6. He concluded that: *"As can be seen from the documents provided by the Private Partner, the obligations under the contract were not fulfilled"*: Report, page 3 (B4/88).

*Guilt as a condition of the responsibility of the Public Partner: JM, section 8*

- 11 The Experts agree that in accordance with clause 115 of the contract, the Public Partner is liable for damages, losses and expenses caused to the Private Partner, if they arose solely through the fault of the Public Partner and such guilt is proven in court. They do not agree as to the burden of proof and its allocation.
- 12 Dr Nesterova considers that Article 359 of the Civil Code establishes a presumption of guilt on the part of a person who breaches an obligation, and civil law imposes the burden on that person (in this case the Public Partner) of proving that he has taken all measures in his power for the proper performance of the obligation (in this case the obligation to bring engineering infrastructure to the plot of land: report, §§ 29-33. She did not express an opinion as to whether the Public Partner was able properly to fulfil its obligation to provide the necessary electrical grid infrastructure since that was a question of fact, not law: Report, §34. But she considered that the undated letter referred to at [10] above *"testifies to the guilt of the Public Partner of its failure to fulfil its obligation"*: § 35. In that letter, see her Report §25 and Appendix 9, Mr Shoganbay, then Deputy Head of the Department of Education, stated that, according to its plans, the designated transformer substation wants to be erected in the future under another not yet concluded Public Private Partnership agreement for a similar kindergarten which in the event was not concluded.

- 13 Mr Privalov stated that the guilt of a person under Article 359 can only be determined in accordance with the PPP contract where there is evidence of guilt. Here, the provision of the land plot without comment by the Private Partner about the infrastructure at the time of transfer meant that there was no such evidence. The letter relied on by Dr Nesterova was not such evidence. It was about the construction of a transformer substation, a permanent connection, which was carried out with the consent of the Private Partner and paid for at prices provided by the Private Partner itself: JM, section 8, Mr Privalov's point (iii).

*Restoration of Financial Balance in the event of a destabilizing event: JM, section 9*

- 14 The experts did not agree. Dr Nesterova considered that Public Partner was under an obligation to restore the initial economic balance of interests of the Parties in the event of the Public Partner's failure to fulfil its obligations under the PPP Contract: Report, §§ 40-41. That balance, she stated, was reflected in Appendix 7 to the PPP Contract, the financial and economic model ("FEM") of the kindergarten: Report, §40.
- 15 Dr Nesterova stated that if, *"due to the violation by the [Public] Partner of its obligations"*, the amount of the Private Partner's costs turned out to be *"higher than planned"*, then *"all such unforeseen costs, within the meaning of [clauses] 105(1), 107(2) and 109 of the [PPP contract] are subject to compensation by the [Public] Partner in order to restore the initial balance of economic interests"*: Report, §41 By clause 105(1), what the PPP contract calls *"disruption events"*, but Dr Nesterova calls *"destablizing conditions"* include the failure of the Public Partner to fulfil its obligations under the contract, and *"clause 107(2) ... provides for the restoration of the financial balance in accordance with the [FEM], if there is imbalance as the result of a destabilizing event"*: JM, section 9, Dr Nesterova's (ii) and (iii).

- 16 Mr Privalov's view on this, as summarised in JM, section 9 is:

- (i) *"All investments invested by the [Public] Partner are compensated in full in accordance with the agreement and schedule for the payment of the bare minimum wage."*
- (ii) *"Moreover, the operation of the constructed kindergarten by 100% without the provision of services under the State order in violation of the agreement indicates that the Private Partner compensates all financial investments in excess of the amounts received from the state, even proving the guilt of the state partner in court."*

The only reference in his Report to placement under the state order is at page 11 (B4/96) which states that *"the unilateral use of the constructed facility – a kindergarten for 360 places, is contrary to the Agreement"* and refers to clause 49 of the PPP contract.

*The terms and conditions of the Supplementary Agreements No 1 and No 2 for the reimbursement of the Private Partner's costs, JM section 10*



- 17 The experts agree that Supplementary Agreements No. 1 and No. 2 amended the PPP Contract in terms of making payments for the capital investment, transferring the transformer substation, and increasing the construction period. They do not agree on whether the fact of entering into Supplementary Agreements limited the Private Partner's right to compensation for other expenses in excess of those stipulated by these Supplementary Agreements.
- 18 Dr Nesterova's view is that clause 5 of Supplementary Agreement No 2 means that, by increasing the size of the KIZ by the cost of constructing a transformer substation, the parties understood that there are other costs of the Private Partner associated with an increase in the cost of the project, and agreed but all such losses (costs and lost profits) associated with an increase in the cost of the project will be compensated to the Private Partner.
- 19 Mr Privalov's view on this, as summarised in JM, section 10, is that the conclusion of Supplementary Agreement No. 2 on granting the Private Partner the right to compensation for costs, expenses and lost profits associated with an increase in the cost of the project, provided that the guilt of the Public Partner in these circumstances is proved in accordance with clause 115 of the PPP contract. As to the transformer substation, he stated that it was designed, built and paid (fully compensated for the cost) with the full consent of the Parties, and at prices provided by the Private Partner. The references in his Report to the effect of the Supplementary Agreements are on pages 10 and 11 (B4/95-96). On page 10 it is stated that after the Private Partner addressed the Public Partner about the lack of infrastructure, extensive *"correspondence was provided to resolve the issue, which resulted in the conclusion of Additional Agreement No. 1... where the issue of the construction of a transformer substation and payment of its cost was mutually resolved"* On page 11 it is stated that the actions of the Parties as shown in the correspondence and the Supplementary Agreements is that *"when a solution to the problem was required, when there was talk about increasing the construction time, or the construction of a transformer substation, the issues were resolved, the deadlines were revised, funds for the construction of the substation (at prices provided by the Private Partner) were allocated"*. This, Mr Privalov stated *"is stipulated both by the [PPP contract], as well as by the norms of the Civil Legislation, and by business practices"*.

*Kazakhstan Civil Code Articles 366 and 629(1): JM sections 11-12*

- 20 Dr Nesterova and Mr Privalov disagreed about the effect of Articles 366 and 629(1) of the Kazakhstan Civil Code, respectively on Creditor's Delay and the obligation of the customer to assist the contractor in the performance of work to the extent and in the manner prescribed by the contract. Dr Nesterova, Report §§ 44 - 46 and JM section 11, states that in accordance with Article 366; (i) *"it is mandatory for the for a creditor to compensate the debtor for all losses that are in causal connexion with the delay made by the creditor"*; (ii) *The types of delay of the creditor include non-performance*

*by the creditor of actions before which the debtor could not fulfil his own obligation; and (iii) “the only circumstance that releases the creditor from liability for delay is the fact proven by the creditor that the delay is caused by circumstances for which he is not responsible”.* The second part of Article 629(1) provides that, in the event of the non-performance by the customer of the obligation to assist the contractor, *“the contractor has the right to demand compensation for damages including the extra costs, caused by the downtime or deferral of execution of work or increase in the price of work”.* Dr Nesterova stated that *“therefore, the Respondent’s delay in fulfilling its obligation to equip the land plot with the necessary infrastructure services serves as the basis for liability to the claimant in the form of compensation for losses caused by the corresponding delay in the construction of the kindergarten and putting it into operation”*: Report, §46, JM section 12.

- 21 Mr Privalov’s view is that Article 366 applies only if there is guilt, evidenced in court as provided by clause 115 of the contract. He stated that in the absence of a single document, whether a financial or other report in accordance with Appendix No 5 of the contract, *“it is impossible to objectively assess the guilt of the state of the Public Partner only from the controversial veil of not providing one part of the infrastructure”*: JM, section 11 and see the references in the Report to the absence of documentation, e.g. at pp 7, 9 (**B4/ 92 and 94**). The JM also records in section 12 that Mr Privalov believes that the land plot was provided in a timely manner with the infrastructure at the time of transfer without comments, that the delay in the start of construction, was through no fault of the Public Partner, and that the Public Partner took responsible measures to resolve issues relating to the implementation of the contract.

*Article 655 of the Civil Code: Reviewing the Price of a Construction Contract: JM, section 13*

- 22 The experts did not agree. Dr Nesterova dealt with this in §§45-53 of her Report. On the basis of Articles 629(1) and 655 of the Civil Code, she stated that the provision in the contract of a fixed cost for the costs of building a kindergarten does not deprive the Private Partner of the right to additional compensation for unforeseen costs: Report §51. She also stated that the Private Partner has the right to demand compensation for its additional costs caused by an increase in the deadlines for the execution of work, downtime of its personnel, an increase in the cost of maintaining facilities and personnel as well as any other costs caused by the Public Partners delay in fulfilling its obligation to ensure the construction of engineering infrastructure and the consequent deviation from the initial parameters of the project: Report, §51.
- 23 Mr Privalov’s summary in JM, section 13 states that he considers that the contract defines certain types of work and costs with which the Private Partner agreed by signing it. Moreover, in the case of the construction of the transformer substation, the Private Partner itself ordered the design and estimate documentation and built the substation as shown quickly and without delay at the prices it had provided. Everything has been paid for and reimbursed. This summary appears to reflect passages from pages 10 and 11 of his Report (**B4/ 95-96**) to which I refer when

summarising his views on Articles 366 and 629(1) of the Civil Code in § 22 of this Appendix.

*Legal Protection of Investors in Kazakhstan: Entrepreneurial Code, Article 276, JM, section 14*

- 24 The experts did not agree. Dr Nesterova dealt with this in the section of her report on reviewing the Price of a Construction Contract, which I have summarised at [23] above. She relied on the right of an investor under Article 276(1) and (2) of the Entrepreneurial Code to compensation for harm caused by acts of State bodies that do not comply with Kazakh law and illegal actions (inaction) of officials of those bodies. Her overall conclusion in § 53 is that the Kazakh investment legislation guarantees the investor full compensation for all his losses caused as a result of improper fulfilment by state bodies of their obligations to investors.
- 25 Mr Privalov's summary in JM, section 14 makes two points. The first, (i) is that *"all investment costs are compensated in accordance with the agreement and are paid on time"*. The second, (ii), is that *"in violation of contractual obligations, the Private Partner, after the construction of the kindergarten, 100% exploits it in his own commercial interests. At the same time, the state, compensating the costs of building a kindergarten, is not able to provide places within the framework of the state order."*
- 26 Mr Privalov's Report does not refer to Article 276 of the Entrepreneurial Code. At page 11 (B4/96), it is stated that

*"non-compliance by the Private Partner with the requirements of the [Public] Partner to provide places under the state order, first of all, contradicts the essence on of the legislation on Public Private Partnership. In this case, operating a 100% kindergarten for 360 places, Buldirshin-2012 LLP - a Private Partner, damages both the state and children entitled to receive this service from the state."*

*Compensable Damages, JM, section 15*

- 27 The experts did not agree. Dr Nesterova's summary in this section of the JM states:
- (i) *"the issue of the composition and [amount] of damages to be recovered is a matter of evidence and falls within the prerogative of the court";*
  - (ii) *"Under Kazakh law (Article 9(4) of the Civil Code), losses are understood to be expenses that are incurred or must be incurred by a person in order to compensate for property damaged caused by a violation of an obligation, loss or damage to a person's property (actual damage), as well as lost income, which the person would have received under normal conditions of turnover if his counterparty had not violated his obligation (lost profit);*

- (iii) *“The general rule relating to damages is that damages incurred must be recovered”;*
- (iv) *“Based on the general principle that a party making material claims must substantiate the grounds and amount of its claims, Kazakh judicial practice is based on the fact that certain proven losses are subject to recovery, the amount of which is calculated by the claimant”;*
- (v) *“In accordance with [Article 350(4) of the Civil Code], when determining the amount of lost profits, the measures taken by the creditor to obtain it and the preparations made for this purpose are taken into account”;*
- (vi) *“the causal relationship between the debtors breach of his obligations and the creditors losses, proven by the recoverer, is a necessary basis for recovering damages”.*

Sub-paragraph (ii) summarises § 4 of Dr Nesterova’s Report; (iii), (iv) and (v) summarise §55, and (vi) summarises §56.

28 Mr Privalov’s summary in JM, section15 states:

- (i) *“Losses incurred as part of the evidence under this agreement may arise only during the analysis and provision all financial and other statements as part of the execution of Appendix No 5 to the agreement. In this case, how much money was received and from which investor, when and at what interest, how much own funds were used, how much was paid”;*
- (ii) *“the starting point in this case is clause 157 of the agreement. The construction period of the PPP facility is determined by the parties within 38 ... months from the date of the Financial Closing by the Private Partner”;*
- (iii) *Clause 1(13) of the PPP contract defines Financial Closure as “the date on which the Private Partner provides a written notification to the Public Partner that he has received the right to access the use of funds, including those provided by financial institutions investors under agreements with the Private Partner on financing necessary for the construction of the PPP facility. There is no information”.*

As to (i), Appendix 5 of the contract is referred to at pages 4, 9 and 12 of Mr Privalov’s Report (B4/89, 94 and 97). As to (ii), his Report does not refer to clause 157 of the contract but pages 10-11 (B4/95-96) state that the construction period was extended by Supplementary Agreement No 2. As to (iii), the Report contains references to the term “financial closure” at pp. 9 and 12 (B4/94 and 97) and to the absence of documents at pages 7, 9-10 and 12 (B4/92, 94-95 and 97).

*Penalty for misuse of other people’s money: JM, section 16*

29 The issue concerns Article 353 of the Civil Code, the heading to which on the English translation of the Civil Code on the Republic of Kazakhstan Ministry of Justice’s website is “Liability for unlawful use of somebody’s funds” and which uses the term “damages”.

30 The experts did not agree. Dr Nesterova's summary of §§57- 59 of her Report in this section of the JM states:

- (i) *"Illegal use of other people's money entails the obligation of the offender to pay, at the request of the victim, a legal penalty in the manner prescribed by Article 353 of the Civil Code ..."*
- (ii) *"To file a claim for the recovery of a penalty under Article 353 of the Civil Code ... does not require an agreement between the debtor and the creditor on the penalty, since it is legal";*
- (iii) *Article 353 provides that "the legal penalty is subject to collection from the moment of the first day of misuse of other peoples funds and until the day the money is actually paid to the creditor".*

31 Mr Privalov's summary in JM, section 16 states that he believes that:

- (i) *Unlawful use of other people's money is possible only in case of violation of the agreement by any party. Violations of the Public-Private Agreement ... from no government partner provided".*
- (ii) *Illegal use of funds by the Public Partner is not allowed. All financial issues are resolved in accordance with the Agreement.*

32 There is no reference to Article 353 in Mr Privalov's Report, but at page 11 (B4/96) it is stated that the issues were resolved by the Supplementary Agreements when the deadlines were extended and funds for the construction of the transformer substation were allocated.

*Obligations of the Private Partner to Transfer the PPP facility to communal ownership; JM, section 20*

33 The experts did not agree. Dr Nesterova's summary of §§78-80 of her Report in this section of the JM states:

- (i) *"Article 284(2) of the Civil Code ... expressly provides for the right of a person to suspend the performance of obligations if the counterparty improperly performs counter obligations."*
- (ii) *"This rule covers any counter obligations of a bona fide a counterparty faced with improper performance of an obligation by its counterparty."*
- (iii) *In accordance with this rule, the Claimant has the right to suspend the fulfilment of its obligation to transfer the PPP object to communal ownership until the Respondent fulfils the counter obligation to properly compensate the claimant for investment costs."*

34 Mr Privalov's summary in JM, section 20 states:

- (i) *“As can be seen from the materials provided, the Claimant grossly violates the agreement, both in terms of the provision of the state educational order, and in terms of transferring objects to communal ownership.”*
- (ii) *“All the Claimant’s claims for compensation for investment costs, damage caused by the untimely commissioning of the facility, which are caused by the fault of the Respondent, are disputable and not supported by sufficient evidence.”*

As to (i) pages 3-4 and 7-8 of Mr Privalov’s Report (**B4/88-89 and 92-93**) refer to documents provided which he states show that the Private Partner did not fulfil its obligations under the contract. As to (ii), pages 4, 7, and 9-12 (**B4/89, 92 and 94-97**) refer to the absence of documents and the insufficiency of the evidence filed. There is no reference to Article 284 in his Report.